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No. **2403** .....

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CHARLIE LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

\_\_\_\_\_  
**TRANSCRIPT OF RECORD**

\_\_\_\_\_

Upon Writ of Error to the United States District Court for  
the Western District of Washington, Northern Division.

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**FILED**

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Records of U.S. Circuit  
Court of appeals  
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No. ....

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CHARLIE LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

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## TRANSCRIPT OF RECORD

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United States District Court, Western District of Washington,  
Northern Division.

May Term, 1913.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### INDICTMENT.

United States of America, Western District of Washington,  
Northern Division.—ss.

The grand jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

### COUNT I.

That heretofore, to-wit: On or about the 5th day of March, 1913, one Charlie Louie and one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: Sixty-four (64) five-tael tins of opium, prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said Charlie Louie and the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Washington, contrary to law, from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown, they, the said Charlie Louie and the said James A. Ralston then and there well knowing that the same had been imported as afore-

said into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided.

## COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: Sixty-four (64) five-tael tins of opium, prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Washington, contrary to law from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown, he, the said James A. Ralston then and there well knowing that the same had been imported as aforesaid into the United States contrary to law;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Charlie Louie did then and there on or about said 5th day of March, 1913, wilfully, knowingly, unlawfully and feloniously aid, abet, counsel, command, induce and procure the said James A. Ralston, as aforesaid, wilfully, knowingly, unlawfully and feloniously to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of said opium, prepared as aforesaid, after the same had been imported contrary to law, as aforesaid, they, the said James A. Ralston and said Charlie Louie then and there well knowing that the same had been imported as aforesaid, into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.



## COUNT III.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one Charlie Louie and one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: Twenty-five (25) five-tael tins of opium prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said Charlie Louie and the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Washington, contrary to law, from some foreign country to the ground jurors unknown, by some person or persons to the grand jurors unknown, they, the said Charlie Louie and the said James A. Ralston then and there well knowing that the same had been imported as aforesaid into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

## COUNT IV.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: Twenty-five (25) five-tael tins of opium, prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and

feloniously imported into the United States, into the Northern Division of the Western District of Washington, contrary to law from some foreign country to the grand jurors unknown by some person or persons to the grand jurors unknown;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Charlie Louie did then and there, on or about said 5th day of March, 1913, wilfully, knowingly, unlawfully and feloniously aid, abet, counsel, command, induce and procure the said James A. Ralston, as aforesaid, wilfully, knowingly, unlawfully and feloniously to receive, conceal, buy sell, and facilitate the transportation, concealment and sale of said opium, prepared as aforesaid, after the same had been imported contrary to law, as aforesaid, they, the said James A. Ralston and said Charlie Louie then and there well knowing that the same had been imported as aforesaid, into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

#### COUNT V.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one Charlie Louie and one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: Forty (40) five-tael tins of opium prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said Charlie Louie and the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Wahsington, contrary to law, from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown, they, the said Charlie Louie and the said James A. Ralston then and there well knowing that the same had been imported



as aforesaid into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

#### COUNT VI.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: Forty (40) five-*tael* tins of opium, prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Washington, contrary to law from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Charlie Louie did then and there, on or about said 5th day of March, 1913, wilfully, knowingly, unlawfully and feloniously aid, abet, counsel, command, induce and procure the said James A. Ralston, as aforesaid, wilfully, knowingly, unlawfully and feloniously to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of said opium, prepared as aforesaid, after the same had been imported contrary to law, as aforesaid, they, the said James A. Ralston and the said Charlie Louie then and there well knowing that the same had been imported as aforesaid, into the United States contrary to law; against the peace and dignity of the statute in such case made and provided.

#### COUNT VII.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one Charlie Louie and one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: One Hundred and twenty-nine (129) five-tael tins of opium prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said Charlie Louie and the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Washington, contrary to law, from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown, they, the said Charlie Louie and the said James A. Ralston then and there well knowing that the same had been imported as aforesaid into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

### COUNT VIII.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 5th day of March, 1913, one James A. Ralston, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to-wit: One Hundred and Twenty-nine (129) five-tael tins of opium, prepared for smoking, after said opium had been imported into the United States contrary to law; and the said opium prior to the time when the said James A. Ralston did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale thereof, as aforesaid, had been wilfully, knowingly, unlawfully and feloniously imported into the United States, into the Northern Division of the Western District of Washing-



ton, contrary to law from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Charlie Louie did then and there, on or about said 5th day of March, 1913, wilfully, knowingly, unlawfully, and feloniously aid, abet, counsel, command, induce, and procure the said James A. Ralston, as aforesaid, wilfully, knowingly, unlawfully and feloniously to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of said opium, prepared as aforesaid, after the same had been imported contrary to law, as aforesaid, they, the said James A. Ralston and the said Charlie Louie then and there well knowing that the same had been imported as aforesaid, into the United States contrary to law; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

C. F. RIDDELL,  
United States Attorney.

JOHN J. SULLIVAN,  
Assistant United States Attorney.

Indorsed: The United States vs. Charlie Louie and James A. Ralston. Indictment for Violation of Act of Feb. 6, 1909. A True Bill. Theodore N. Haller, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury and Filed in the U. S. District Court Sept. 12, 1913. Frank L. Crosby, Clerk.



In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES A. RALSTON AND CHARLIE LOUIE, Defendants.

### PLEA OF FORMER ACQUITTAL

The defendant Charlie Louie, in his own person, and by his attorneys Vanderveer & Cummings, comes now into Court, and having heard the indictment read in the above entitled action, says that the United States of America ought not to further prosecute the said indictment against him, the said Charlie Louie, in respect to the offenses in the second, fourth, sixth and eighth counts of said indictment against him, the said Charlie Louie, because he says that heretofore, to-wit, on the 2nd day of April, 1913, in a term of the United States District Court, for the Western District of Washington, Northern Division, held at Seattle in said District, the Grand Jurors chosen, selected and sworn in and for said District, in the name of and by the authority of the United States of America, upon their oaths presented an indictment against him, the said Charlie Louie, which said indictment is in words and figures as follows:

In the District Court of the United States for the Western  
District of Washington. Northern Division.

November Term, 1912.

No. 2442

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES A. RALSTON AND CHARLIE LOUIE, Defendants.

### INDICTMENT

The United States of America, Western District of Wash-  
ington, Northern Division—ss.

The grand jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

That heretofore, to-wit, on or about the 1st day of September, 1912, one James A. Ralston and one Charlie Louie, within the Northern Division of the Western District of Washington, to-wit, at the City of Seattle, County of King, State of Washington, did wilfully, knowingly, unlawfully, fraudulently and feloniously conspire, combine, confederate, and agree together to commit an offense against the United States in and by corruptly, wilfully, knowingly and fraudulently agreeing together fraudulently and knowingly to import and bring into the United States, and to assist in so importing and bringing into the United States as aforesaid opium prepared for smoking, and to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of such opium, knowing the same to have been fraudulently imported contrary to law as aforesaid.

The subject matter of such unlawful conspiracy, the objects thereof, and the means by which said objects were to be effected, so far as known to these grand jurors are as follows, to-wit:

That on and prior to said 1st day of September, 1912, the said defendants, James A. Ralston and Charlie Louie, were in the City of Seattle, State of Washington, and within the Northern Division of the Western District of Washington, and that said Charlie Louie then and there was in

possession of certain funds, moneys and property with which to furnish the means to carry out said conspiracy; that the principal object of said unlawful conspiracy was that the said James A. Ralston should go to the Province of British Columbia, in the Dominion of Canada, and there, and at divers other places to the grand jurors unknown, should receive opium prepared for smoking purposes, and should fraudulently and knowingly import and bring into the United States, and assist in so importing and bringing in the said opium, and that the said Charlie Louie should thereafter receive said opium and transport, conceal and sell and should assist in the transportation, concealment and sale of such opium with the knowledge that the same had been imported contrary to law as aforesaid; that the said Charlie Louie should furnish the said James A. Ralston with the money wherewith to pay the expenses of his said trips to the Province of British Columbia, in the Dominion of Canada, and to divers other places to the grand jurors unknown, and wherewith to purchase opium prepared for smoking purposes.

And it was a further object of said conspiracy that the said Charlie Louie should pay to the said James A. Ralston certain sums of money, the exact amounts whereof are to the grand jurors unknown, as his part, reward, and compensation in the proceeds arising from the sale of said opium and that the said Charlie Louie should retain the balance of the proceeds and profits arising from the purchase, transportation and sale of said opium.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, James A. Ralston, did, at the said City of Seattle, on or about the 1st day of December, 1912, fraudulently and knowingly import and bring into the United States, six (6) 5-tael tins of opium prepared for smoking.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, Charlie Louie, did, at the said City of Seattle, on or about the 1st day of December, 1912,



receive and conceal six five-tael tins of opium prepared for smoking, he, the said Charlie Louie, then and there well knowing that the said opium had been fraudulently and knowingly imported and brought into the United States contrary to law as aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, Charlie Louie, did, on or about the 4th day of March, 1913, go to room number 303 of the premises known as the Carleton Apartments in the City of Seattle, in the State of Washington, and within the Northern Division of the Western District of Washington.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, James A. Ralston, did, on or about the 5th day of March, 1913, have in his possession and conceal at the City of Seattle, in the State of Washington and within the Northern Division of the Western District of Washington, one hundred forty-nine (149) five-tael tins of opium prepared for smoking; he, the said James A. Ralston, then and there well knowing that the said opium had theretofore been fraudulently and knowingly imported and brought into the United States contrary to law as aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, James A. Ralston, did, on or about the 5th day of March, 1913, fraudulently and knowingly transport and facilitate in transporting and aid and assist in transporting one hundred forty-nine (149) five-tael tins of opium prepared for smoking, he, the said James A. Ralston, then and there well knowing that the said opium had theretofore been fraudulently and knowingly imported and brought into the United States contrary to law as aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, Charlie Louie, did, on or about the 5th day of March, 1913, go as a passenger in interstate commerce from the city of Seattle, in the State of Washington, to the City of Portland in the State of Oregon.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, James A. Ralston, did, on or about the 5th day of March, 1913, have in his possession and conceal at the city of Seattle, in the State of Washington and within the Northern Division of the Western District of Washington, forty (40) five-tael tins of opium prepared for smoking, and said defendant, James A. Ralston, did, on or about the 5th day of March, 1913, fraudulently and knowingly transport and facilitate in transporting and aid and assist in transporting said forty (40) five-tael tins of opium prepared for smoking, he, the said James A. Ralston, then and there well knowing that the said opium had theretofore been fraudulently and knowingly imported and brought into the United States contrary to law as aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, James A. Ralston, did, on or about the 5th day of March, 1913, have in his possession and conceal at the city of Seattle, in the State of Washington, and within the Northern Division of the Western District of Washington, and fraudulently and knowingly transport and facilitate in transporting and aid and assist in transporting twenty-five five-tael tins of opium prepared for smoking, he, the said James A. Ralston, then and there well knowing that the said opium had thereafter been fraudulently and knowingly imported and brought into the United States contrary to law as aforesaid.



And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of such unlawful conspiracy, and during the continuance thereof, and to effect the object thereof, the said defendant, James A. Ralston, did, on or about the 5th day of March, 1913, have in possession and conceal at the city of Seattle, in the State of Washington, and within the Northern Division of the Western District of Washington, and fraudulently and knowingly transport and facilitate in transporting and aid and assist in transporting sixty-four (64) five-ael tins of opium prepared for smoking, he, the said James A. Ralston, then and there well knowing that the said opium had theretofore been fraudulently and knowingly imported and brought into the United States contrary to law as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

C. F. RIDDELL,  
United States Attorney.

Witnesses examined before grand jury:

GUS HAMER  
O. Z. PERRY  
EMMA FRYLAND  
MAGGIE McLEAN.

To which said last mentioned indictment the said Charlie Louie pleaded "Not Guilty" and the said United States of America joined issue on said plea; that afterwards, to-wit, on the said 15th day of May, 1913, in the said District Court of the United States, for the Western District of Washington, Northern Division, a jury, duly and regularly summoned, impaneled and sworn to try the said issue joined as aforesaid, upon their oaths did find and say: that the said Charlie Louie was not guilty of the offense of which the said Charlie Louie was accused in said last mentioned indictment, and did say that the said Charlie Louie was not guilty of said offenses as charged in said indictment; as by the records in said court remaining more fully and at large appears, which said judgment of acquittal still remains in full force and effect, and not in the least reversed and



made void. And said Charlie Louie further says that the said Charlie Louie and the said Charlie Louie so indicted and acquitted are one and the same person and not other and different persons, and that the offense of which he, the said Charlie Louie was so indicted and acquitted as aforesaid, and the offenses of which he, the said Charlie Louie, is now indicted in said second, fourth, sixth and eighth counts of the indictment herein, are one and the same offense, and not other and different offenses, and that the acts and things charged in the said second, fourth, sixth and eighth counts of the indictment against the said Charlie Louie in this case are incidents included in the indictment heretofore rendered, and of which the said Charlie Louie was acquitted as aforesaid.

Wherefore he prays judgment if the United States of America ought further to prosecute the second, fourth, sixth and eighth counts of the indictment herein against him, and that he, the said Charlie Louie, may be dismissed and discharged from said second, fourth, sixth and eighth counts of said indictment.

VANDERVEER & CUMMINGS,

Attorneys for Defendant.

---

United States of America, Western District of Washington,  
Northern Division—ss.

Charlie Louie, being first duly sworn, on oath deposes and says: That he is one of the defendants named in the above entitled action; that he has read the foregoing Plea of Former Acquittal, knows the contents thereof, and that the same is true.

CHARLIE LOUIE.

Subscribed and sworn to before me this 23rd day of September, A. D. 1913.

H. McC. BILLINGSLEY,

Notary Public in and for the State of Washington, residing at Seattle.

Copy of within Plea of Former Acquittal received and due service acknowledged this 24th day of Sept., 1913.

C. F. RIDDELL,

Attorney for Plaintiff.

Indorsed: Plea of Former Acquittal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 25, 1913. Frank L. Crosby, Clerk. By E. M. L.

---

In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES A. RALSTON AND CHARLIE LOUIE, Defendants.

### DEMURRER TO PLEA OF FORMER ACQUITTAL

Comes now the above named plaintiff by C. F. Riddell, United States Attorney for the Western District of Washington, and demurs to the plea of former acquittal heretofore entered herein by the above named defendant Charlie Louie, on the ground and for the reason that the same does not state facts sufficient to constitute a defense to the above entitled action, nor to any of the counts in said plea mentioned.

C. F. RIDDELL,

United States Attorney.

Received copy of within Demurrer this 29th day of September, 1913.

VANDERVEER & CUMMINGS,

Attys. for Charlie Louie.

Indorsed: Demurrer to Plea of Former Acquittal. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 29, 1913, by E. C. Ellington, Deputy.

In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER

The above entitled matter having come on duly and regularly for hearing on the demurrer of the United States to the plea of former acquittal heretofore interposed by the defendant, Charlie Louie, and the Court having listened to the argument of counsel, the said defendant, Charlie Louie, being present in Court and being represented by his attorneys, Vanderveer & Cummings, and the plaintiff appearing by C. F. Riddell, United States Attorney for the Western District of Washington;

It is Hereby Ordered that the said demurrer be, and the same hereby is sustained.

To the entry of this order the defendant excepts and his exception is hereby allowed.

Done in open court this 1st day of October, 1913.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order Sustaining Demurrer of Plaintiff.  
Filed in the U. S. District Court, Western Dist. of Washington, Oct. 1, 1913, Frank. L. Crosby, Clerk. By E. M. L., Deputy.



In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE, ET AL., Defendants.

VERDICT

We, the jury in the above entitled cause find  
Defendant Charlie Louie is not guilty of Count I  
Defendant Charlie Louie is guilty of Count II  
Defendant Charlie Louie is not guilty of Count III  
Defendant Charlie Louie is not guilty of Count IV  
Defendant Charlie Louie is not guilty of Count V  
Defendant Charlie Louie is not guilty of Count VI  
Defendant Charlie Louie is not guilty of Count VII  
Defendant Charlie Louie is not guilty of Count VIII

OLIVER P. ANDERSON, Foreman.

Indorsed: Verdict: Filed in the U. S. District Court,  
Western District of Washington, Northern Division, Oct. 10,  
1913. Frank L. Crosby, Clerk. By B. O. W., Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

STIPULATION EXTENDING TIME TO FILE BILL OF  
EXCEPTIONS

It is hereby stipulated and agreed by and between the  
United States District Attorney, in and for the Western

District of Washington, Northern Division, Attorney for the plaintiff in the above entitled action, and Vanderveer & Cummings, attorneys for Charlie Louie, one of the defendants above named, that the time within which the defendant Charlie Louie may file a Bill of Exceptions herein may be extended for a period of thirty days from and after the 20th day of October, 1913.

Dated Seattle, Washington, October 14, 1913.

United States District Attorney.

By John J. Sullivan, Attorney for Plaintiff.

VANDERVEER & CUMMINGS,

Attorneys for Charlie Louie, one of the defendants above named.

Indorsed: Stipulation Extending Time to File Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 13, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

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In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

It coming on to be heard on motion of Vanderveer & Cummings, attorneys for Charlie Louie, one of the defendants in the above entitled action, for an order nunc pro tunc extending the time within which said defendant might file herein his Bill of Exceptions thirty days from and after the 20th day of October, 1913, and it appearing to the Court that no other extensions have been applied for or granted to the defendant herein for filing a Bill of Exceptions, and that the parties have heretofore, and on the 14th day of October, 1913, stipulated for the extension herein applied for,

it is now, therefore ordered that the time within which the defendant Charlie Louie shall be permitted to file herein his Bill of Exceptions be, and the same hereby is, extended thirty days from and after the 20th day of October, 1913, or to and inclusive of the 19th day of November, 1913.

It is further ordered that this order be entered nunc pro tunc as of the 14th day of October, 1913.

Done in open court this 12th day of November, A. D. 1913.

EDWARD E. CUSHMAN, Judge.

O. K. SULLIVAN, Asst. U. S. Atty.

Indorsed: Order Extending Time for Filing Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 13, 1913. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

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In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ASSIGNMENT OF ERRORS

Comes now the defendant Charlie Louie and files the following assignment of errors upon which he will rely in his prosecution of the Writ of Error in the above entitled cause:

1. That the Court erred in sustaining the demurrer interposed by the plaintiff herein to this defendant's plea of former acquittal filed herein to all counts of the indictment herein.

2. The Court erred in admitting in evidence, over this defendant's objection, Government's Exhibits 3 to 9 and 11 to 13 inclusive, and refusing and denying this defendant's motion to strike the same and withdraw the same from the consideration of the jury.



3. The Court erred in instructing the jury, upon the admission in evidence of Government's Exhibits 3 to 9 and 11 to 13 inclusive, as follows, to-wit:

"The Court: Gentlemen, you will understand that the charge of smuggling is made up of two elements, as nearly every other crime is, that is, his having, concealing, receiving and facilitating the transportation of opium with a certain knowledge. Now these letters are not admitted for the purpose of your determining whether he did have this opium in his possession or not, but solely bear on his knowledge and his means of knowledge, whether that will enable you at all to determine if the Government establishes that he had it in his possession whether it might have been accidentally or innocently."

4. The Court erred in instructing the jury, upon the admission in evidence of Government's Exhibits 3 to 9 and 11 to 13 inclusive as follows, to-wit:

"Gentlemen, so far as the Court recalls the testimony now, it is simply that these letters were found in his trunk. It is simply a circumstance you are authorized to consider."

5. The Court erred in admitting in evidence Government's Exhibit 2, and denying defendant's motion to strike the same and withdraw the same from the consideration of the jury.

6. The Court erred in admitting Government's Exhibit 1 for identification, and denying defendant's motion to strike the same and withdraw the same from the consideration of the jury.

7. The Court erred in admitting Government's Exhibit 14 for identification, and denying defendant's motion to strike the same and withdraw the same from the consideration of the jury.

8. The Court erred in permitting Government's witness Maggie MacLean to testify, over this defendant's objection, as to the visits of the defendant Ralston to the home of this defendant during the early part of the year 1913, and thereafter denying the motion of this defendant to strike the testimony.

9. The Court erred in instructing the jury upon the testimony of the witness Maggie MacLean, to the visits of the

defendant Ralston to the home of this defendant as follows, to-wit:

“The Court: The jury will understand that this defendant is acquitted on a former charge of conspiracy when he was charged with conspiring with a man by the name of Ralston to smuggle opium into this country, and certain overt acts were charged tending to carry that into effect. All through this case you must consider all of this evidence in the light of the established fact that he was innocent of that conspiracy. Now evidence has already gone in concerning these men visiting back and forth. You must consider that along with the light of the opportunity the defendant had to assist Ralston in smuggling opium, if he did have an opportunity and Ralston did smuggle opium, but you are not to consider it in the light of any agreement or plan or conspiring or combining by agreement between these men, because the defendant has been acquitted of that.”

10. The court erred in admitting in evidence over the objection of this defendant, Government's Exhibit 20 and in denying the motion of the defendant to strike the same and withdraw the same from the consideration of the jury.

11. The Court erred in denying this defendant's motion to strike the testimony of the witness A. B. Hamer as to a conversation between this defendant and one Emma Friedland occurring on the 10th day of April, 1913.

12. The Court erred in instructing the jury concerning the said testimony of the witness A. B. Hamer as follows, to-wit:

“The Court: The motion is denied, and an exception allowed. You are not to find him guilty of this charge. He may have been guilty of something else some other time, some other place, but it will be admitted for the purpose of your determining, if you find him at one time in the possession of opium whether or not that possession may have been innocent or incidental, or what his purpose or knowledge was concerning transactions of that kind. It is not admission for any other purpose.”

13. The Court erred in denying the motion of this defendant to strike the testimony of Marian Bergman concerning a conversation which occurred between this defendant and Emma Friedland on the 10th day of April, 1913.



14. The Court erred in instructing the jury as to the said testimony of the said Marian Bergman as follows, to-wit:

“You are instructed that evidence of other transactions is only admitted for the purpose of showing whether or not the defendant had any knowledge of opium.”

15. The Court erred in overruling the objection of this defendant to the following question propounded to the witness Emma Friedland:

“Q. Did he (meaning this defendant) ever call there for any opium?”

16. The Court erred in denying the motion of this defendant to strike the answer of Emma Friedland to the said question hereinbefore mentioned.

17. The Court erred in instructing the jury on the testimony of Emma Friedland as follows, to-wit:

“The Court: That is the same objection you made heretofore. Motion is denied and the objection overruled. The jury will understand it is only admitted for the purpose of showing the knowledge and intent of the defendant Louie in other transactions in this case than are directly charged. Exception allowed.”

18. The Court erred in refusing the request of this defendant to instruct the jury as follows, to-wit:

“I instruct you that if you believe that any witness in this case has been induced to testify by threats or coercion of any kind, you will entirely disregard the testimony of such witness.”

19. The Court erred in giving to the jury the instruction No. 8, and more particularly set forth in this defendant's bill of exceptions.

20. The court erred in rendering against this defendant a judgment of guilty, and that said judgment is contrary to the law.

Wherefore the said defendant Charlie Louie and plaintiff in error prays that the judgment of the said court be reversed, and such directions be given that full force and efficacy may inure to the defendant Charlie Louie by reason



of his plea set up to the indictment herein, and that said Court be instructed and directed to dismiss said indictment and discharge this defendant.

VANDERVEER & CUMMINGS,  
Attorneys for Defendant Charlie Louie.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 6, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### BILL OF EXCEPTIONS

This was an action by the United States of America against the defendants Charlie Louie and James A. Ralston on an indictment returned the 12th day of September, 1913, by the Grand Jurors of the Northern Division of the Western District of Washington, for the violation of the Act of February 9, 1909.

On the 15th day of September, 1913, being duly arraigned, the defendant Charlie Louie entered his plea of "Not Guilty" to all counts of the indictment. On the 25th day of September, 1913, the defendant Charlie Louie filed herein a plea of former acquittal to all counts, 2, 4, 6 and 8, of the indictment, and thereafter, and on the 30th day of September, the plaintiff filed a demurrer to said plea, and said demurrer coming on for argument in the above entitled Court was, on the 1st day of October, by the Court, sustained, and an order filed and entered sustaining said demurrer. To the sustaining of said demurrer, and to the entering of said order the defendant Charlie Louie duly and regularly excepted, and his exception was accordingly, and is now, hereby allowed.

Thereafter, and on the 8th day of October, this cause came on regularly for trial before The Hon. Edward E. Cushman, a judge of the above entitled court, the United States of America appearing by the United States District Attorney for the Western District of Washington, Northern Division, and the defendant Charlie Louie appearing in person and by Vanderveer & Cummings, his counsel, and a jury having been duly empaneled and sworn, the following proceedings were had:

GUY M. WATKINS was duly sworn to testify as a witness on behalf of the Government, in its case in chief. Exhibits, were marked for identification "Government's Exhibits 1 and 2). These letters, the witness testified, he had found in the bottom of a wardrobe in his office on July 5th on the night of the defendant Charlie Louie's arrest, and after the defendant had been taken to the office to be searched. That prior to the defendant's being searched, he walked back and forth close to the wardrobe, and that while the witness had been searching certain trunks belonging to the defendant James A. Ralston, his back had been turned to the defendant Charlie Louie. That afterwards the defendant Charlie Louie was searched and nothing found upon him.

QUONG QUOY was duly sworn to testify as a witness on behalf of the Government, in its case in chief.

The witness identified translations from Chinese into English of fourteen letters, which letters, with their translations, were marked for identification Government's Exhibits 1 to 14 inclusive; 3 to 14 inclusive bearing Chinese dates. The witness affixed to each letter the corresponding date of the English calendar, which English dates appear thereon written in lead pencil.

EDWARD D. LEMARGE was duly sworn to testify as a witness on behalf of the Government, in its case in chief.

Being shown Exhibits 3 to 9 inclusive and 11 to 13 inclusive, together with their respective envelopes, the witness testified that he had found the letters on the 6th of March, 1913, in a trunk in the residence of the defendant Charlie Louie.

Counsel for the Government then offered in evidence the letters marked for identification Government's Exhibits 3 to 9 inclusive and 11 to 13 inclusive in their envelopes, and



together with their respective translations. There was no other evidence offered by the Government concerning said exhibits, nor to connect the contents of said exhibits with the charges of the indictment. The defendant Charlie Louie objected to the offer of the letters in evidence on the ground that they were irrelevant, immaterial and incompetent, and for the further reason that their post marks bore dates in the spring and summer of 1912 long prior to the translations alleged in the indictment, and that there had been no evidence yet introduced to connect them or their subject matter with any of the facts or transactions alleged in the indictment; and for the further reason that it had not been shown that the letters had ever been in the defendant's possession, were written by him or received by him, or that he had any connection with them. The objection was overruled and an exception allowed.

Thereupon the Court instructed the jury as follows:

"THE COURT: Gentlemen, you will understand that the charge of smuggling is made up of two elements, as nearly every other crime is, that is, his having, concealing, receiving and facilitating the transportation of opium with a certain knowledge. Now these letters are not admitted for the purpose of your determining whether he did have this opium in his possession or not, but solely bear on his knowledge and his means of knowledge, whether that will enable you at all to determine if the Government establishes that he had it in his possession whether it might have been accidentally or innocently.

Thereupon the defendant Charlie Louie moved to strike the evidence and withdraw the letters from the consideration of the jury. This motion was denied, and an exception allowed.

Thereupon counsel for the defendant read to the jury Government's Exhibits 3 to 9 inclusive and 11 to 13 inclusive, whereupon the defendant Charlie Louie moved the Court to strike the testimony relative to the letters, and instruct the jury to disregard such testimony and the letters. The motion was denied, and an exception allowed, whereupon the Court instructed the jury as follows:

"Gentlemen, so far as the Court recalls the testimony now, it is simply that these letters were found in his trunk. It is simply a circumstance you are authorized to consider."



Thereupon the defendant Charlie Louie excepted to the Court's instruction on the ground that it was an erroneous statement of the law and prejudicial to the defendant, and for the reason that the jury were not entitled to consider the letters, or their contents, for any purpose in the case.

CHRISTOPHER DENMAN was duly sworn to testify as a witness on behalf of the Government, in its case in chief.

The witness testified that he was familiar with the handwriting of the defendant Charlie Louie. He identified Government's Exhibits 2 and 14 for identification as being in the handwriting of the defendant Charlies Louie. The witness also being shown the hotel register of the Multnomah Hotel, identified a signature shown him as the signature of the defendant Charlie Louie.

The Government thereupon offered in evidence Government's Exhibit 2 for identification. To this offer the defendant Charlie Louie objected on the ground that Exhibit for identification was immaterial and irrelevant. The objection was overruled, and an exception allowed. Exhibit 2 was admitted in evidence and marked for identification Government's Exhibit 2.

The Government thereupon offered in evidence Government's Exhibit 1 for identification, to which offer the defendant Charlie Louie objected on the ground that it was immaterial and irrelevant. The objection was overruled and an exception allowed. Government's Exhibit 1 for identification was admitted as Government's Exhibit 1.

Thereupon the Government offered in evidence, the page from the Multnomah Hotel register on which appeared the signature identified as the signature of Charlie Louie; to which offer the defendant Charlie Louie objected on the ground that the evidence was immaterial, irrelevant and incompetent. The objection was overruled, and an exception allowed.

The Government thereupon offered in evidence, Government's Exhibit 14 for identification; to which the defendant Charlie Louie objected on the ground that the evidence was immaterial, irrelevant and incompetent. The objection was overruled, and an exception allowed.

There was no further evidence offered by the Government concerning Exhibits 1, 2 and 14 for the purpose of connecting the contents of said exhibits, the facts or transactions therein recited, with any of the facts or transactions alleged in the indictment.

The defendant Charlie Louie thereupon moved severally to strike Exhibits 1, 2 and 14, which motion, and the whole thereof, was denied, and an exception allowed.

Thereupon the Government read to the jury Government's Exhibits 1, 2 and 14.

Thereupon the defendant Charlie Louie moved the Court to instruct the jury to disregard the testimony relative to Exhibits 1, 2 and 14, and not to consider their contents. This motion was denied and an exception allowed.

MRS. MAGGIE MACLEAN, duly sworn as a witness on behalf of the Government, in its case in chief.

The witness testified that she lived at No. 420 11th Avenue, about thirty feet from the residence of the defendant Charlie Louie, and she knew him by sight. Thereupon counsel for the Government propounded the following question:

Q I will ask you if you have ever seen a man by the name of Ralston visit the defendant Louie's home, during the early part of 1913?

Thereupon counsel for the defendant Charlie Louie objected to the question upon the ground that it was immaterial irrelevant and incompetent, and as having a bearing only upon the charge of conspiracy of which the defendant Charlie Louie has been acquitted, as set forth in his plea of former acquittal on file in the cause. The objection was overruled, and an exception allowed.

A Yes.

Q How many times have you seen Ralston visiting Louie's house?

To which question the defendant Charlie Louie objected on the ground that it was immaterial, irrelevant and incompetent. The objection was overruled and an exception allowed.

A Five or six times.

Q Did he carry anything with him?

To this question the defendant Charlie Louie objected, on the ground that it was irrelevant, immaterial and incompetent. The objection was overruled, and an exception allowed.

A Yes, on one occasion he carried a grip.

The witness was further questioned over the same objection of the defendant Charlie Louie, and answered that Ralston would generally call about noon, and would enter always by the back door. That she had never seen Ralston leave, but thought that he went out the front door.

There was no further testimony on the part of the Government concerning any of the visits of Ralston to the defendant Louie's house, nor any further testimony as to anything which occurred on any of the visits testified to by this witness.

The defendant Charlie Louie moved the Court to strike the testimony of the witness MacLean and to instruct the jury to disregard it. The motion of the defendant was denied and an exception allowed. The Court instructed the jury as follows:

“THE COURT: The jury will understand that this defendant is acquitted on a former charge of conspiracy when he was charged with conspiring with a man by the name of Ralston to smuggle opium into this country, and certain overt acts were charged tending to carry that into effect. All through this case you must consider all of this evidence in the light of the established fact that he was innocent of that conspiracy. Now evidence has already gone in concerning these men visiting back and forth. You must consider that along in the light of the opportunity the defendant had to assist Ralston in smuggling opium, if he did have an opportunity and Ralston did smuggle opium, but you are not to consider it in the light of any agreement or plan or conspiracy or combining by agreement between these men, because the defendant has been acquitted of that.”

To this instruction the defendant Charlie Louie excepted on the ground that it was an erroneous statement of the law. The exception was allowed.



Thereupon the Government had marked for identification as Government's Exhibit 20, a telegram signed "Chas.", which was admitted by the defendant Charlie Louie to be in his hand writing. The Government then offered the telegram in evidence. The defendant Charlie Louie objected on the ground that it was irrelevant, immaterial and incompetent, and had not been properly identified with any of the transactions alleged in the indictment. The objection was overruled, and an exception allowed.

No further evidence was offered by the Government to identify the telegram, or concerning the telegram, or to connect its contents with any of the facts or allegations charged in the indictment. Counsel for the defendant Charlie Louie moved that the telegram be stricken and be withdrawn from the consideration of the jury. The motion was denied, and an exception allowed.

A. B. HAMER was duly sworn to testify as a witness on behalf of the Government, in its case in chief.

The witness testified that he was a United States Customs Inspector, and on the 10th day of April, 1913, overheard a conversation between the defendant Charlie Louie and one Emma Friedland.

Q (By the Government) Just state the words that were used.

A She said "One time Ralston went away and told me that he left six cans of opium in a suit case for you."

No further testimony was offered by the Government to connect the transaction testified to by the witness with any of the charges alleged in the indictment.

Thereupon the defendant Charlie Louie moved the Court to strike the answer on the ground that it had no bearing upon the issue in this case; that it obviously related to other opium, there being no six cans charged in the indictment, and on the further ground that it was irrelevant, immaterial and incompetent, and prejudicial to the defendant.

"THE COURT: The motion is denied, and an exception allowed. You are not to find him guilty of that charge. He may have been guilty of something else some other time, some other place, but it will be admitted for the purpose of your determining, if you find him at one time in the possession of opium whether or not this possession this

time may have been innocent or accidental or what his purpose or knowledge was concerning transactions of that kind. It is not admissible for any other purpose."

To this instruction the defendant excepted, and his exception was allowed.

MARIAN BERGMAN was duly sworn as a witness to testify on behalf of the Government, in its case in chief.

The witness testified that on the 10th of April, 1913, she was present at No. 518 Union Street, Seattle, Washington, at a conversation between Emma Friedland and the defendant Charlie Louie, in which Emma Friedland asked the defendant Louie why he did not get the defendant Ralston out on bail, and asked him further about his having put six tins of opium in a box.

There was no further evidence offered by the Government to connect the transaction testified to by the witness concerning the defendant putting six tins of opium in a box with any of the charges alleged in the indictment.

The defendant Charlie Louie moved that the testimony of the witness relative to the defendant's putting six tins of opium in a box be stricken, and the jury instructed to disregard it, upon the ground that it was immaterial, irrelevant and incompetent, and related to a transaction not connected with the case, and was highly prejudicial to the defendant. The motion was denied, and an exception allowed; and the Court instructed the jury as follows:

"You are instructed that evidence of other transactions is only admitted for the purpose of showing whether or not the defendant had any knowledge of opium."

To this instruction the defendant Charlie Louie excepted on the ground that it was an erroneous statement of the law, and his exception was allowed.

EMMA FRIEDLAND was duly sworn as a witness to testify on behalf of the Government, in its case in chief.

The witness testified that she was the proprietress of a millinery store at No. 518 Union Street, Seattle, Washington, and that the defendant Ralston had a room in the rear of her store.



Q (By the Government) Did the defendant Louie call there often?

A Yes sir.

Q Did he ever call there for any opium?

The question was objected to by the defendant Charlie Louie on the ground that it was too indefinite. The objection was overruled, and an exception allowed.

A Yes sir, he called for six tins that Mr. Ralston—he called there once when Mr. Ralston left six cans.

There was no further evidence on the part of the Government to connect this transaction, or the six tins described by the witness, with any of the charges alleged in the indictment.

The defendant Charlie Louie moved the Court to strike the answer on the ground that the testimony was immaterial, irrelevant and incompetent; that the transaction was not shown to be in any way connected with any of the charges alleged in the indictment, and that the opium was not shown to be any part of that described in the indictment.

THE COURT: That is the same objection you made heretofore. Motion is denied and the objection overruled. The jury will understand that evidence of other transactions is only admitted for the purpose of showing the knowledge and intent of the defendant Louie in this case that are directly charged. Exception allowed.

The defendant Charlie Louie excepted to this instruction on the ground that it was an erroneous statement of the law, and his exception was allowed.

The foregoing evidence and testimony was all offered by the Government in its case in chief and the case of the Government being concluded, and afterward the case of the defendant Charlie Louie having been concluded, the cause was argued to the jury by counsel for the Government and by counsel for the defendant.

The defendant Charlie Louie had previously submitted to the Court at the commencement of the trial an instruction in writing which he requested the Court to give to the jury in his charge to the jury at the conclusion of the case, which instruction was as follows:



"I instruct you that if you believe that any witness in this case has been induced to testify by threats or coercion of any kind, you will entirely disregard the testimony of such witness." This instruction the Court refused to give to the jury and no similar instruction was given. To the refusal of the Court to give such instruction, the defendant Charlie Louie excepted and his exception was allowed.

Thereupon the Court instructed the jury as follows:

1. "GENTLEMEN OF THE JURY: You will take the indictment out with you in this case when the Court concludes its instructions, and it is your duty to examine the indictment. Be sure, at least, that you are thoroughly acquainted with the charge in it in considering this case, but the Court will outline to you the charges contained in it so that you may have it freshly in your mind while the Court is instructing you, so that you understand the application of the instructions in the case. There are eight counts in this indictment, and the charge, as it is generally termed, is smuggling opium."

2. "The charge in the first count, in the 1st, 3rd, 5th and 7th counts is that the defendant—two defendants—one defendant Ralston is not on trial—so if the Court through this case has said defendant you will understand that I am referring to Charlie Louie—that the defendant received, bought and concealed, and transported and facilitated in the Northern Division of the Western District of Washington, the transportation of certain opium. That is, the first count refers to 64 tins of opium, the third count to 25, the 5th to 40 and the 7th to 129. Of course you will see that 64 and 25 and 40 added together make 129. The Court feels justified in assuming that the opium referred to in the 1st, 3 and 5th counts is the same opium referred to in the 7th count, simply are tins added together in one lump count. The charge in those odd numbered counts is that the defendant had this opium in his possession and had received it and bought it and concealed it or transported it or facilitated its transportation. When I say conceal I am using the word the statute does, without examining the indictment, I am not sure it does use the word conceal. The even numbered counts concern the same opium, or parcels of opium, but they are to the effect that the defendant Ralston having received and bought and concealed and transported these packages of opium or these parcels of opium, that the defendant Charlie Louie aided him and assisted him in it. You will

also find in these counts certain language about his counseling and advising and commanding him, which I will refer to later.

3. "Now the burden of proof is upon the Government to establish at least as concerns one of these counts every material allegation in it by evidence sufficient to convince you beyond a reasonable doubt before you can return of guilty in this case. You will consider each count separately and render your verdict separately concerning these counts, as I shall afterwards instruct you.

4. "In this offense there are at least four material things for you to consider. That is, it is charged that this opium that was smuggled or handled was opium prepared for smoking and of foreign manufacture. Before you can convict the defendant you must find by evidence sufficient to convince you beyond a reasonable doubt that it was both those things. Then you must find on the odd numbered counts before you can convict the defendant by the amount of evidence I have indicated, that is by evidence sufficient to convince you beyond a reasonable doubt, that he or Ralston as his agent, received, transported, bought, or facilitated the transportation of at least one batch of this opium—parcels of this opium as described in the indictment. Then last you must find that he not only had it in his possession or assisted in transporting it or selling it, but that he did it knowingly, that is that he did it knowing that it was opium, and knowing it was opium prepared for smoking and of foreign manufacture, which had theretofore been imported unlawfully into the United States. You understand that before 1909, before February 9, 1909, opium prepared for smoking, of foreign manufacture could be lawfully brought into the United States by paying the duty. There was certain evidence put in here, some witness' opinion, that this never had paid the duty because he didn't find any marks of cancelled stamps on it. In substance that was his evidence. You will understand that the opium to be subject of smuggling as charged in this indictment, either must have been brought into the United States before this date in 1909 without paying the duty, or it must have been brought in since that date in 1909. Since February 9, 1909, it has been illegal to bring any opium into the United States prepared for smoking.

5. "There has been considerable discussion in this case regarding the other case. The Court has tried to keep you



fully advised concerning the other case, in which the defendant has plead that he has been acquitted. The indictment on which he was acquitted charged in a number of counts—I don't remember the exact number, in substance as follows: That is, does the defendant consent to my outlining the charge in the other indictment on the state of the record?

MR. VANDERVEER: Yes.

THE COURT: 6: "The indictment charged that here in Seattle or in the Northern Division of the Western District of Washington that these two defendants, Ralston and Louie, entered into a conspiracy to smuggle opium, and roughly the outlines of that conspiracy were that Ralston was to bring the opium into the United States, that Louie, Charlie Louie, had money and would finance the smuggling of this opium, and that Louie would receive the opium here in Seattle and attend to its disposition; that pursuant to that conspiracy Ralston did import in December of last year six tins of opium, and that pursuant to that conspiracy and to effect the object of it Louie received six tins of opium in December, and that the defendant Charlie Louie went to the Carleton Apartments, Room 303, March 4, as an act to effect the object of the conspiracy; that Mr. Louie concealed on March 5th 14 tins, and that on March 5th Mr. Ralston transported 14 tins of opium; and that Louie on March 5th went to Portland to effect the object of the conspiracy, and that on the same date Ralston concealed 40—transported 25 and concealed 64. Now of that charge which I have outlined to you the defendant Charlie Louie was acquitted, and the Constitution provides that he or any other defendant shall not twice be put in jeopardy for the same offense. He has been acquitted of it and in considering this case you will not undertake to reconsider that case in any way. You will act throughout your deliberations in this case on the assumption that he was acquitted because he was innocent. One jury is not undertaking to review the action of another.

7. 'The 2d, 4th, 6th and 8th counts of this indictment allege that on the 5th day of March, 1913, one James Ralston did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of certain opium, and that the defendant wilfully, knowingly, unlawfully and feloniously did aid, abet, counsel, command, induce and procure the said James Ralston to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of said



opium. In this connection I instruct you, that the defendant has heretofore been accused, tried by a jury and acquitted of the charge of conspiring, confederating and agreeing with the said James Ralston to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of this same opium. Under the law no man can be twice put in jeopardy for the same offense. Whether you agree with it or not, the judgment of this Court in the case I have referred to in which the defendant was so acquitted, is final and conclusive, and in your consideration of the case now before you, you will assume that the defendant was not guilty of conspiring, confederating and agreeing with the said James Ralston, or of advising, counseling, commanding, inducing or procuring the said James Ralston to receive, conceal, buy, sell or facilitate the transportation, concealment or sale of said opium; and will consider merely the question whether the defendant did some physical act by which he aided or assisted said James Ralston in a physical and material way in receiving, concealing, buying, selling or facilitating the transportation, concealment or sale of such opium. Unless you find beyond a reasonable doubt that the defendant did such an act, you will find a verdict of not guilty upon the second, fourth, sixth and eighth counts of this indictment.

“During the argument of counsel I tried to explain to you the scope of this counseling and advising. That would be eliminated from this case by reason of the fact that the defendant had been acquitted of the crime of conspiracy in connection with this same opium. Possibly I can explain it to you by illustration better than I can in any other way. The Court has withdrawn from your consideration this charge, and simply left you to consider whether he did some act to aid Ralston in receiving any of this opium, and that he did it knowingly.”

“Now a man might, as I say, for the purpose of illustration, might agree to go and plan and scheme to murder some one. I don't want you simply because I use an extreme crime of that kind to think I am trying to prejudice you in any way against the defendant. It is simply for an illustration because crimes like murder are simple and are ideal as illustrations. Now after such a plan or scheme or design has been entered into if one of the two men came to the other man and said ‘our man is down here sitting at a table with his back to the door’ giving that in-

formation might be an act that aided in having the man murdered. So I hope that you will be able to separate any plan or combination of these two men that was charged in the indictment for conspiracy of which this defendant has been acquitted, from this charge that the Government has made here that he aided Ralston in receiving this opium, but unless these conversations or this telephone message that has been told about was something more than a general keeping in touch with one another or general agreement, unless it was knowingly giving him knowledge of where he could get opium, then you will not consider it. If you have a reasonable doubt about it you will not consider it as supporting this charge of aiding, because he having been acquitted is entitled to that reasonable doubt. If you have one in your mind concerning how far he went in that matter, if it is true, that he left word there that some one would call Ralston up, even if he suspected it concerned smuggling, if it was a pal or partner and didn't know what he was going to tell him, or if you have a reasonable doubt on that subject you will give him the benefit of it. It must have been that he was trying to get knowledge to the defendant Ralston where he would find certain opium, and by giving him that knowledge he aided him to get it. Anything short of that would not support this charge. You must be satisfied of that beyond a reasonable doubt before you convict him on that matter."

To the Court's instruction No. 8, and the whole thereof, the Defendant Charlie Louis excepted on the ground that it was an erroneous statement of the law, and erroneously instructed the jury that they might consider any act of counseling and advising if they believed it was of assistance to Ralston in concealing and transporting opium, and on the further ground that said instruction was in conflict with the other instructions given by the Court to the effect that in determining whether or not the defendant had aided and abetted one James Ralston they would consider only whether he had done some physical act to assist Ralston. The exception was allowed.

9. The Court has admitted for your consideration, certain evidence showing the relations of the defendant and one James Ralston on other occasions that the one involved in this case; also evidence tending to show that on other occasions the defendant had in his possession opium not involved in this case. The Court has also admitted in



evidence certain letters which it is claimed were found in the defendant's possession or in his home. None of this evidence has any bearing upon the question whether the defendant received, concealed, bought or sold, or facilitated the transportation of the opium referred to in the first, third, fifth and seventh counts of the indictment. Neither has it any bearing upon the question whether the defendant did any act aiding and abetting one James Ralston in receiving, concealing, buying, selling or facilitating the transportation, concealment or sale of said opium, and it was not admitted for your consideration, and should not be considered by you in that connection. The question whether the defendant received or concealed and transported opium as alleged in the four counts of the indictment, or did an act aiding and abetting James Ralston in doing so, as alleged in the other four counts of the indictment, must be determined without reference to this evidence, and if you have a reasonable doubt about these matters you will not consider this other evidence at all, but will return a verdict of Not Guilty upon such counts as may be involved in such doubt. If, on the other hand, you find from the other evidence before you beyond a reasonable doubt, either that the defendant received, concealed, bought or sold the opium as alleged in four of the counts, or on the other hand did some physical act by which he aided and abetted James Ralston in so doing, as alleged in the four remaining counts, then you will consider the evidence I have referred to for the purpose of determining whether in so doing the defendant acted wilfully and knowingly as alleged in the indictment, and you will consider this evidence for no other purpose whatever.

10. "I instruct you that you cannot find the defendant guilty upon any count of this indictment merely upon evidence that he knew that one James A. Ralston was concealing, buying, selling or transporting opium, or upon evidence that he counselled, procured or advised him in so doing, except as I have explained to you already.

11. "I instruct you that unless you find from the evidence before you, beyond a reasonable doubt, that the opium referred to in the indictment was imported into the United States contrary to law, you will return a verdict of "Not Guilty."

12. "I instruct you that unless you find beyond a reasonable doubt that the opium which has been referred to in



this case, is opium of foreign manufacture, you will return a verdict of "Not Guilty."

13. "In the first, third, fifth and seventh counts of this indictment, the defendant is accused of receiving into his possession, and of concealing, buying and selling, and facilitating the transportation, concealment and sale of certain opium. In this connection I instruct you that these acts of receiving, concealing and transporting opium may be done by the defendant in person or some agent having possession of the opium and acting in his behalf. In this case it is the Government's theory that the opium referred to in this indictment was in the possession of James Ralston merely as the agent of the defendant Charlie Louie. This is a fact which it is incumbent upon the Government to establish by evidence beyond a reasonable doubt, before it can ask at your hands a conviction upon the first, third, fifth and seventh counts of this indictment, and accordingly I instruct you that if you have a reasonable doubt upon the question whether said James Ralston was acting in the defendant's behalf or in his own behalf, it will be your duty to return a verdict of "Not Guilty" upon the first, third, fifth and seventh counts."

14. "Evidence is either direct and positive, or presumptive and circumstantial. When a witness testifies directly to the facts constituting the crime the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is presumptive and circumstantial. The commission of a crime may be proven either by the direct testimony of eye witnesses, or by circumstantial evidence; but when circumstantial evidence is relied on for a conviction, the circumstances should be consistent with each other. They must all be consistent with the defendant's guilt; and they must be inconsistent with any reasonable theory of the defendant's innocence. Evidence purely circumstantial in character which does not exclude every reasonable and rational theory of the defendant's innocence cannot, as a matter of law, be convincing beyond a reasonable doubt.

15. "Evidence has been received of the good reputation of the defendant in this community as a law-abiding citizen. You will consider this evidence, together with all the other evidence in the case, in arriving at your verdict,

and if, from all the evidence you have a reasonable doubt concerning the defendant's guilt, you will return a verdict of "Not Guilty."

61. "Every person accused of crime is presumed in law to be innocent of the crime charged until his guilt is proven by competent evidence to the satisfaction of the jury and beyond all reasonable doubt. This presumption is not a mere fiction which a jury may lightly disregard, but is a substantial right accorded by law to protect the innocent from unjust and unfounded accusations. It accompanies the defendant throughout the trial of the entire case. It follows therefore that you have no right to draw any inference of guilt from the fact that the grand jury has returned an indictment against this defendant, nor will you form your opinions of guilt or innocence as the evidence is being introduced during the trial, or until all of the evidence has been presented on both sides, and until you have been instructed by the Court upon the law of the case, and you have finally retired to your jury room to deliberate upon your verdict."

17. "As I have already instructed you, the defendant in this case is presumed to be innocent until the contrary has been shown to your satisfaction beyond a reasonable doubt. It is not incumbent upon the defendant to prove his innocence. The burden rests upon the Government to prove his guilt. This burden never shifts to the defendant, and unless the Government has satisfactorily met this requirement as to the defendant, the jury will acquit such defendant."

18. "In a criminal case it is not sufficient that the Government should prove its case by mere preponderance of the evidence, nor is it necessary on the other hand that it should prove its case positively and beyond all doubt. The law requires, however, that the Government should prove every material issue to your satisfaction and beyond all reasonable doubt. The expression 'reasonable doubt' means in law just what the words ordinarily imply. To be reasonable, a doubt must be founded upon reason. In deliberating upon the evidence in this case you should not search for reasons for conviction, neither should you look for reasons for an acquittal. You will confine your deliberations solely to the evidence that has been admitted for your consideration. This evidence you will consider in the light of the instructions given you by the Court. Ignoring



all other things and disregarding all prejudices you should attempt fairly, conscientiously and honestly to ascertain the truth about the matter alleged in this indictment and if at the end of your deliberations you have a reasonable doubt concerning any of the material matters alleged in the indictment, it will be your duty to acquit the defendant."

19. "I instruct you that in a criminal action you cannot base conviction upon mere probabilities, but before you can find any defendant guilty you must be satisfied of guilt beyond all reasonable doubt."

20. "You will disregard entirely the fact that the defendant has made a motion for a directed verdict in his favor. In ruling upon this motion the Court has not even considered whether the defendant was guilty or innocent. Again, I want to caution you that the Court has no view upon this question and has not expressed any view in passing upon this motion. It is the Court's province to pass upon, and instruct you regarding, the law of the case; and it is your province to decide the facts."

21. "I instruct you that you are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses who appear before you. If, in the course of the trial, in ruling upon objections to evidence or upon motions made by counsel, the Court may seem to you to have expressed an opinion upon any fact in this case, you will entirely disregard such matter. The Court as such has no opinions about the facts and has not intended to express any. In determining the amount of credit which you will give to the testimony of the various witnesses who have appeared before you, you will consider their demeanor upon the witness stand; their apparent candor and fairness, or lack of it; the opportunities which they may have had for knowing the facts concerning which they have testified. You will be slow to believe that any witness has deliberately testified falsely, but if you do so believe, it will be your duty to entirely disregard the testimony of such witness, except insofar as the same may be corroborated by other credible evidence in the case."

22. 'Counsel in argument commented on the character of one of the women produced as a witness for the Government. If you believe that it was established in this case that either one of those witnesses was a prostitute you would take that into consideration in weighing her testi-



mony. The law is based on the experience of mankind, and the experience of mankind has demonstrated that a woman who sells her virtue generally does so after she abandons her allegiance to the truth, that is about the last good quality she has that she surrenders. Also counsel has argued to you about witnesses being influenced by fear to testify. You understand that as men of experience you will seek to ascertain if any witness appeared before you with an interest in this case, or anything connected with it. You will take into consideration in determining whether he has an interest not only the manner in which he has given his testimony as evidence of that fact, but his relation to the case, and if one of these women who testified feared prosecution or had reason to fear it, and therefore had a motive to seek to ingratiate herself with the Government or prosecution, you would take that into consideration as affecting her evidence in the case in addition to anything that may have been shown concerning her character."

23. "Also in this case there has been evidence concerning oral admissions. The Court instructs you that persons are so liable to be mistaken about something said, either in their arrangement of the words as giving a different meaning to it, or in their failing memory, that it is a rule of law that juries, and Courts for that matter, should carefully scrutinize in weighing any testimony concerning oral admissions of a party against his interest. Their value depends on the fact of whether they were made in the way that the witness says they were made, and the changing of a word here and there, or the adding of a word or taking away of one may change the entire meaning, and they are dangerous in the way of evidence. The Court instructs you that you are to weigh and consider the interest of a witness in the case in passing on his credibility. The defendant having taken the stand in his own behalf you will apply to his evidence the same rules as to that of other witnesses, including his interest in the case."

24. "The Court will submit to you one form of verdict. There are eight lines in it. Reading the first line to explain it "We, the jury, in the above entitled case find the defendant Charlie Louie.....Guilty of Count 1." If that should be your verdict in the case you will draw a line through the blank to show it has been cancelled, and proceed with the other counts. If your verdict is not guilty you should write the word not in that blank, and

treat all the other counts the same. There being eight of them the Court deems this a safer way of disposing of all of them than submitting to you sixteen separate verdicts."

25. "Gentlemen, if there is any phase of the case I have not instructed on you will be given an opportunity to take your exceptions after the jury has retired. If you wish to request any instructions you may now do so."

The foregoing were the entire charge and all the instructions given to the jury.

Thereupon the jury retired in charge of the bailiff to consider their verdict.

Thereafter the jury returned into Court with their verdict signed by their Foreman, and which found the defendant "Guilty" on count 2 of the indictment, and "Not Guilty" on all of the other counts of the indictment.

And thereafter, and on the 14th day of October, 1913, it was stipulated between the parties to this action that the defendant Charlie Louie might have an extension of time to file a bill of exceptions herein for thirty days from and after the 20th day of October, 1913, and thereafter, and on the 13th day of November, 1913, an order was duly entered herein nunc pro tunc as of the 14th day of October, 1913, extending the defendant's time to file his bill of exceptions herein, and pursuant to said stipulation, thirty days from and after the 20th day of October, 1913.

And now in furtherance of justice, and that right may be done, the defendant Charlie Louie presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

VANDERVEER & CUMMINGS,

Attorneys for Defendant Charlie Louie.

Copy of within Bill of Ex. received and due service acknowledged this 19th day of Nov., 1913.

CLAY ALLEN,

Attorney for U. S.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 18, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.



In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

No. 2488.

### ORDER SETTLING BILL OF EXCEPTIONS.

It having been brought on regularly before the Court on this 17th day of February, 1914, upon application of the Defendant Charlie Louie for the settling and certifying of his proposed bill of exceptions lately filed herein, and the time for such settling and certifying of such bill of exceptions having been duly extended by the orders of the Court and by the stipulation of the parties until and including this day, now, therefore, on motion of Messrs. Vanderveer & Cummings, the Defendant's attorneys:

IT IS ORDERED That the said proposed bill of exceptions heretofore filed by the defendant in this case as the same now stands amended as aforesaid, be, and it hereby is, settled as the true bill of exceptions in this cause, and that the same, as so settled, be now and here certified accordingly by the undersigned, the Judge of said Court who presided at the trial of this cause, and that said bill of exceptions, when so certified, be filed by the Clerk.

Done in open Court this 17th day of February, A. D. 1914.

EDWARD E. CUSHMAN,

District Judge of the United States for  
the Western District of Washington, North-  
ern Division.

O. K. Allen, District Attorney.

Indorsed: Order settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 17, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.



In the District Court of the United States for the Western  
District of Washington. Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

No. 2488

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS

Charlie Louie,, one of the defendants in the above entitled cause, feeling himself aggrieved by the verdict of the jury and the judgment of guilty and the sentence therein entered herein on the 20th day of December, 1913, comes now by Vanderveer & Cummings, his attorneys, and petitions the said Court for an order allowing the said Defendant to prosecute a Writ of Error to The Honorable The United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made suspending all further proceedings in this Court and staying the same until the determination of said Writ of Error by the United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioner will ever pray.

VANDERVEER & CUMMINGS,

Attorneys for Defendant Charlie Louie.

Served this 6th day of Jan., 1914.

CLAY ALLEN,

Atty. for Pltf.

Indorsed: Petition for Writ of Error and Supersedeas.  
Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 6, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington. Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

No. 2488

ORDER ALLOWING WRIT OF ERROR.

On motion of Vanderveer & Cummings, Attorneys for  
the Defendant Charlie Louie herein, and upon filing a  
petition for Writ of Error and as Assignment of Errors;

It is ordered that a Writ of Error be, and the same  
hereby is, allowed to have reviewed in the United States  
Circuit Court of Appeals, for the Ninth Circuit, the judg-  
ment heretofore entered herein, and that said Writ of Error  
operate as a supersedeas.

Done in open Court this 6th day of January, A. D. 1914.

EDWARD E. CUSHMAN,  
Judge.

O. K. Allen.

Indorsed: Order Allowing Writ of Error. Filed in  
the U. S. District Court, Western Dist. of Washington,  
Northern Division, Jan. 6, 1914. Frank L. Crosby, Clerk.  
By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

BOND

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

KNOW ALL MEN BY THESE PRESENTS: That we Charlie Louie, as principal, and Lew G. Kay and Ah Seung, as sureties, are held and firmly bound unto the United States of America in the full sum of Two thousand five hundred dollars (\$2,500.00), lawful money of the United States, for the payment of which sum well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators firmly by these presents.

Dated Seattle, Washington, this 6th day of January,  
A. D. 1914.

The condition of this obligation is such that whereas Charlie Louie, the above named principal, is desirous of superseding a judgment of conviction heretofore had and entered in the above entitled action on count one of the indictment heretofore duly and regularly returned into the above entitled Court and charging the Defendant with a violation of the penal code of the United States, and whereas the said Charlie Louie has heretofore sued out a Writ of Error herein to the United States Circuit Court of Appeals, for the Ninth Circuit, and whereas by order heretofore made and entered herein security was required of the said Charlie Louie herein, and as a condition of the said supersedeas, and whereas the said Charlie Louie is desirous of being admitted to bail pending the hearing of the said Writ of Error in the said Circuit Court of Appeals of the United States, for the Ninth Circuit;

NOW, THEREFORE, If the said Charlie Louie shall appear in the above entitled Court whenever he shall be required by the Court to appear, and hold himself in attendance thereon as he may be required and yield obedience to the orders and judgment of the said United States Cir-



cuit Court of Appeals, for the Ninth Circuit, and abide the judgments, orders and decrees of Courts herein, then this obligation to be null and void, otherwise to remain in full force and virtue.

CHARLIE LOUIE,  
LEW G. KAY,  
AH SEUNG.

O. K. CLAY ALLEN,  
Attorney for Pltf.

Approved Jan. 6, 1914.

EDWARD E. CUSHMAN,  
Dist. Judge.

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United States of America, Western District of Washington,  
Northern Division.—ss.

Lew G. Kay, a surety on the annexed bond, being first duly sworn, upon oath deposes and says: That he is a surety on the foregoing obligation, which he executed as his free and vountary act and deed for the uses and purposes therein mentioned; that he resides in Seattle, King County, Washington, and is worth in separate property the sum of Five thousand dollars (\$5,000.00) over and above all his just debts and liabilities, and exclusive of property exempt by law from execution; that his property consists of

Block eighty-two (82), Lake Washington Addition to the City of Seattle; of the reasonable value of Six thousand dollars (\$6,000.00), free and clear from encumbrance.

LEW G. KAY.

Subscribed and sworn to before me this 6th day of January, A. D. 1914.

ED. M. LAKIN,  
Deputy Clerk U. S. Dist. Court,  
Western Dist. of Washington.

(Seal)

United States of America, Western District of Washington,  
Northern Division.—ss.

Ah Seung, a surety on the annexed bond, being first duly sworn, upon oath deposes and says: That he is a surety on the foregoing obligation, which he executed as his free and voluntary act and deed for the uses and purposes therein mentioned; that he resides in Seattle, King County, Washington, and is worth in separate property the sum of Five thousand dollars (\$5,000.00) over and above all his just debts and liabilities, and exclusive of property exempt by law from execution; that his property consists of

Seventy-seven (77) acres in Kitsap County,  
near the Town of Colby;  
of the reasonable value of Seventy-seven hundred dollars (\$7,700.00), free and clear from encumbrance.

AH SEUNG.

Subscribed and sworn to before me this 6th day of  
January, A. D. 1914.

(Seal) ED M. LAKIN,  
Deputy Clerk U. S. Dist. Court,  
Western Dist. of Washington.

Indorsed: Bond. Filed in the U. S. District Court,  
Western Dist. of Washington, Northern Division, Jan. 6,  
1914. Frank L. Crosby, Clerk. Ed. M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER TO TRANSMIT ORIGINAL EXHIBITS.

Now on this day upon motion of counsel for Defendant and Plaintiff in Error, and for sufficient cause appearing, it is ordered that the Plaintiff's original Exhibits as follows, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18

20, 21, 23, 25 and 26, filed and introduced as evidence upon the trial of this cause, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered together with the transcript of record on appeal in this cause.

Dated February 18, 1914.

EDWARD E. CUSHMAN,  
District Judge.

Indorsed: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 18, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER FOR WITHDRAWAL OF EXHIBITS.

Upon the motion of the United States Attorney;

It is ordered that the Government may permanently withdraw plaintiff's exhibits Nos. 24 and 19, being trunk, grips, opium and keys, introduced in evidence in the trial of the above entitled cause.

Dated this 10th day of October, 1913.

EDWARD E. CUSHMAN.

Received the above numbered exhibits this 10th day of October, 1913.

H. F. McGRATH.

Indorsed: Order for withdrawal of exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 10, 1913. Frank L. Crosby, Clerk. By B. O. W., Deputy.



In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER FOR WITHDRAWAL OF EXHIBITS.

Upon motion of the United States Attorney;

It is hereby ordered that the Government may permanently withdraw plaintiff's exhibit No. 15, being a hotel register which was introduced in evidence in the trial of the above entitled cause.

Dated this 24th day of December, 1913.

JEREMIAH NETERER,  
Judge.

Received the above enumerated exhibits this 24th day  
of December, 1913.

C. M. THIEL.

Indorsed: Order for withdrawal of exhibits. Filed  
in the U. S. District Court, Western Dist. of Washington,  
Northern Division, Dec. 24, 1913. Frank L. Crosby, Clerk.  
By E. M. L. Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### STIPULATION

It is hereby stipulated and agreed by and between  
Clay Allen, Attorney for the Plaintiff in the above en-

titled action, and Vanderveer & Cummings, Attorneys for the Defendant, that it shall not be necessary to print in the record to be sent to the Circuit Court of Appeals by the Defendant herein, the original Chinese of exhibits 1 to 9 inclusive, 11 to 14 inclusive, 16, 17 and 20, but that the English translation thereof filed with and attached to said exhibits, alone need be printed.

It is further stipulated and agreed that Exhibit No. 18, consisting of a page of the Seattle Telephone Directory and a memoranda attached thereto, Exhibit No. 21 consisting of a slip of paper, Exhibit No. 23 being a duplicate receipt for the payment of certain express charges, Exhibit No. 25 being several baggage checks, and Exhibit No. 26 consisting of a note book, need not be printed in the record at all, but that the original exhibits themselves shall be, together with the original exhibits hereinbefore mentioned as being in the Chinese language, together with the translations thereto attached and on file herein, shall be sent themselves, to the United States Circuit Court of Appeals with said record.

CLAY ALLEN.

Attorney for Plaintiff.

Indorsed: Stipulation. Filed in the U. S. District Court, Western District of Washington, Northern Division, March 27, 1914. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy.

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In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER

On stipulation of the parties to the above entitled action, it is hereby ordered that there need be printed in the record to be sent to the United States Circuit Court of Appeals, none of the Chinese originals of Exhibits Nos. 1

to 9 inclusive, 11 to 14 inclusive, 16, 17 and 20, but that there need be printed in said record only the English translations of such exhibits attached to and filed with said exhibits.

It is further ordered that Exhibits Nos. 18, 21, 23, 25 and 26 need not be printed in said record, but that the original exhibits, together with the other exhibits hereinbefore mentioned as being in the Chinese language, together with their English translations attached to and filed therewith, shall be sent by the Clerk of this Court to the said Circuit Court of Appeals with said record.

Done in open Court this 27th day of March, A. D. 1914.

JEREMIAH NETERER,  
Judge.

O.K. CLAY ALLEN, Attorney for Pltf.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

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(Translation of Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17 and 20.)

Shung Gee, Cousin:

Since we parted at Boise everything is quiet and I have not done anything. The market for foreign goods in this place is 28 to 28½ at present. Please let me know as to the market in your city. If there is any mail for me I will thank you to forward it to me. Will write you again.

(Signed) LOUIE HO KEUNG.

America, February 25th.

Indorsed: Case No. 2488. Plaintiff's Exhibit 1, United States District Court, Western Dist. of Washington, U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

Mr. Ho Keung, Cousin:

Your letter was received. I may have about ten pieces for you to sell for me. That is to avoid the necessity for



my coming in person, as the trip is too expensive. You ask about the mail, but I have not seen any of your mail in this place.

(Signed) COUSIN GEE.

America, March 4th.

Indorsed: Case No. 2488. Plaintiff's Exhibit 2. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

Cousin Jung Hean:

I beg to inform you that Louie Keung on the 11th or 12th day of the 7th month brought me 47 pieces of goods. The price is \$25.00 apiece, on which we both agreed. I think the price is a little too high, but I didn't argue about it, for we are friends. There is one piece broken among these 47 pieces. It is not first class goods, but like sweet liquid. Mr. Louie Keung has seen it and promised to exchange it next time. I wrote him on the 7th month, over a month ago from now, and told him to send me some goods, but haven't heard from him. Among goods which Louie Keung brought me before were found about twenty pieces poor goods; I hardly can get rid of it. I wish you would tell him to come and take it back or say what is his intention. I inclose herewith a letter for Louie Keung; please see that it is delivered to him. Thank you for the same.

(Seal of Wo Sang Yuen, Walla Walla)

(Signed) LEW LUM HEAN.

Yum year (Republic)  
8th month, 22d day.

Indorsed: Case No. 2488. Plaintiff's exhibit 3. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

Friend Shung Gee:

I beg to inform you that the letter that you sent me was received, which stated about the goods and demand for money, but the money is still unpaid for the goods which I sold to Mr. Wai Ging and Gar Cin. I cannot make any profit on the price at which you sold the goods to me. There is one Mr. Gah Bark who brought 30 tins, selling price \$24.50 each

tin, and Louie Shee brought 60 tins, selling price \$24.75 each tin. Recently the selling price in your city is \$22.50 each piece. There will be no raise in price in Boise within six months. All this is the truth. Perhaps the price is greatly advanced in your city. I am now sending you a check for \$95.00 and hope it will reach you safely. This amount is \$5.00 less than your bill, but I hope you will reduce it and call it square. Thank you for the same.

(Signed) Louie Gah Bun.

Republic 1st year, 5th month, 27th day.  
May 27, 1912.

Indorsed: Case No. 2488. Plaintiff's Exhibit 4. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie Filed Oct. 9, 1913.

(Copy)

Mr. Louie Gee.  
Mr. Louie Tsze.

Dear Friends:

I hope you are both well and prosperous. What's the price of old Lee goods at the present time? Please let me know by wire, for our firm wish to buy some. Please answer.

(Seal of Quong Lee Yuen, Salt Lake.)

(Signed) Lee Fook Sheuk.

July 20, 1912.

Indorsed: Case No. 2488. Plaintiff's Exhibit 5. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

(Copy)

Shung Gee:

Your letter received and noted. Hop Chong still have a small quantity of the black goods on hand at present, for there is no demand in the market recently. The price of

these goods in this city now is from \$24.00 to \$26.00 apiece. If later Hop Chong want to buy some more I will write and let you know.

(Signed) Gah Jing.

Chinese Republic, 5th month, 11th day.  
May 11, 1912.

Indorsed: Case No. 2488. Plaintiff's Exhibit 6. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. , 1913.

(Copy)

Mr. Louie Gee:

Friend: I now wish to buy some goods, from fifty to one hundred pieces, but don't know whether or not you have those goods at the present time. If you have please let me know the value of each piece, as I might buy some if I can make any profit, and will pay cash so that it will be a benefit to us both. Kindly let me know. With regards.

(Signed) Sing Yee.

7th month, 26th day.

Indorsed: Case No. 2488. Plaintiff's Exhibit 7. United States District Court, Western Dist. of Washington, U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

(Copy)

Friend Louie Keung:

I beg to state that among the goods which you sent me some time ago were mixed about twenty pieces of very poor goods. At present all of the good goods have been sold, so now our store has no goods for customers. After you see this note please send us the goods to meet the market, without fail. The past one and a half months we have not received any goods nor heard from you. Some time ago while you were in our store we spoke and agreed with each other that if there should be any poor goods they would have to be exchanged, for I buy and pay for first class



goods and do not buy the sweet liquid. I haven't heard from you for a long time. You are a gentleman, and not a swindler, so let me hear from you about those poor goods which I mention above.

(Seal of Wo Sang Yuen, Walla Walla.)

(Signed) Lew Lum Hean.

Yum year (Republic) 8th month, 22nd day.

Indorsed: Case No. 2488. Plaintiff's Exhibit 8. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 7, 1913.

(Copy)

Louie Gee: Dear Friend:

I wish you would let me know about the Ng Yue Dean case for it has been pending such a length of time. Mr. Ng Chong sent Ng Yue Dean \$10.00 for his expenses some time ago, and I hope this money reached him all right. Please tell Yue Dean to answer Ng Chong. What's the price of black goods in your city at the present time? Please let me know, and oblige,

(Signed) Sing Sho.

1st day, 3rd month.

Indorsed: Case No. 2488. Plaintiff's Exhibit 9. United States District Court, Western Dist. of Washington, U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

(Copy)

Cousin Shung Gee:

I beg to inform you that I am now sending you five hundred dollars (\$500.00) and hope it will reach you all right. I will return to Portland this morning. If you have any goods arriving recently the price at present is about \$17.50 to \$18.00. I think it would be safe to buy some at

this price. I will start back to Seattle at eleven o'clock tomorrow morning.

(Signed) Louie Keung.

America, July 25th.

Indorsed: Case No. 2488. Plaintiff's Exhibit 11. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

(Copy)

Mr. Louie Gee.

Dear Friend:

I am in receipt of your letter and note its contents. It is not much in demand at the present time, for there is a white man here who often has a small quantity, so I have enough for the present. I will let you know later.

(Seal of Yee Yuen Co.)

(Signed) Ng Hock Jing.

Chinese Republic, 5th month, 25th day.

Indorsed: Case No. 2488. Plaintiff's Exhibit 12. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

July 30, 1912.

My dear Mr. Louie:

I am very sorry in the delaying of my answer to your letter which reached me last week. Its due to the fact that I was taken ill for the last several days. I hope you will excuse me for such a reason. Regarding to the oil you are asking I would like to tell you that it has made an awful jump since I went away. The retail price is 22 and the wholesale price is no less than 19. And besides there are no stock on hand of nobody. I try to get some for my friends back East which caused a great deal of trouble in getting it and yet I could not make a sufficient consignment to meet the demand. Will forward you, if any variety received later. May I thank you for your kind entertainment and

hospitality which you have shown me during my stay in your city.

With best wishes to you and Mrs. Louie.

Yours truly, S. N. DORE.

Indorsed: Case No. 2488. Plaintiff's Exhibit 13. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

Hop Chong & Co.

Dearest wife:

Everything looks O. K. and I have looked over the statements of Jim and the woman there is nothing against me so don't worry but the first hearing come up next Wednesday but I don't that I am going to wait or not. Will let you tomorrow. Hoping that you take care of yourself. Your Chas.

Endorsed: Case No. 2488. Plaintiff's Exhibit 14. United States District Court. Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

THE WESTERN UNION TELEGRAPH COMPANY

J. A. Ralston, c/o Hotel King Edward, Victoria B. C.

I think Rose left on steamer Sol Duc. Chas.

Indorsed: Case No. 2488. Plaintiff's Exhibit 16. United States District Court. Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

(Copy)

Shung Gee.

Cousin:

I beg to inform you that I told you that I bought 68 pieces, but now have recounted them and have only 64 pieces. I wish you would make inquiry about it and let me know.



Write me care of Hop Chong. I will leave here on the ten o'clock train tonight for Portland.

July 24th. (Signed) Louie Hor (?) Keong.

Indorsed: Case No. 2488. Plaintiff's Exhibit 17. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

### WESTERN UNION TELEGRAPH COMPANY

J. A. Ralston: PX-Seattle Wn. Jany 13th 1913

Care Hotel King Edward, Victoria, B. C.

I think Rose left on Steamer Solduc. Chas.

231pm

Indorsed: Case No. 2488. Plaintiff's Exhibit 20. United States District Court, Western Dist. of Washington. U. S. vs. Charlie Louie. Filed Oct. 9, 1913.

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In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER ENLARGING TIME

Now on this 3rd day of February, 1914, upon motion of Attorney for Plaintiff in Error and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 5th day of March, 1914.

EDWARD E. CUSHMAN, District Judge.

Indorsed: Order Enlarging Time. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 4, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER FIXING TIME TO FILE RECORD

Good cause having been shown it is hereby ordered that the Clerk's time for preparing, certifying and transmitting the record in this cause to the United States Circuit Court of Appeals be, and hereby is extended to and including the 4th day of April, 1914.

Done in open Court this 5th day of March, 1914.

JEREMIAH NETERER,

Judge U. S. District Court, West. Dist. of Washington.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, March 5, 1914.  
Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

### ORDER EXTENDING TIME TO FILE RECORD.

Good cause having been shown, it is hereby ordered that the Clerk's time for preparing, certifying and transmitting the record in this cause to the United States Circuit Court of Appeals be, and hereby is, extended to and including the 15th day of April, 1914.

Done in open Court this 1st day of April, A. D. 1914.

JEREMIAH NETERER,

Judge United States District Court, Western District  
of Washington.

Indorsed: Order Extending Time to File Record. Filed  
in the U. S. District Court, Western Dist. of Washington,  
Northern Division, Apr. 1, 1914. Frank L. Crosby, Clerk.  
By Ed M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES A. RALSTON AND CHARLIE LOUIE, Defendants.

PRAECIPE

To the Clerk of the Above Entitled Court:

You will please include in the record on Writ of Error  
the Indictment, Plea Former Acquittal, Demurrer to Plea,  
Order Sustaining Demurrer, Verdict, Stipulation Extending  
Time to File Bill of Exceptions, Order Extending, Assign-  
ment of Errors, Bill of Exceptions, Order Settling Service,  
Petition for Writ of Error, Order Allowing, Writ of Error,  
Citation, Original Exhibits, Bond, Order for Withdrawing  
Exhibits 24 and 19, Order for Withdrawing Exhibit 15,  
Translation of Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13,  
14, 16, 17, 20.

VANDERVEER & CUMMINGS.

Indorsed: Praecipe. Filed in the United States Dis-  
trict Court, Western District of Washington, Jan. 30, 1914.  
Frank L. Crosby, Clerk. By Deputy.



In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2488

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLIE LOUIE AND JAMES A. RALSTON, Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO  
TRANSCRIPT OF RECORD, ETC.

United States of America, Western District of Washington.  
—SS.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the printed pages, numbered from 1 to 67, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for the preparation and certification of the printed transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes—226 folios at 30c per folio .....	\$67.80
Certificate of Clerk to typewritten transcript of record —3 folios .....	.90
Seal to said certificate.....	.40
Certificate of Clerk to Original Exhibits—3 folios.....	.90
Seal to said certificate .....	.40
	<hr/>
	\$70.40

I hereby certify that the above cost for preparing and certifying record amounting to \$70.40 has been paid to me by Messrs. Vanderveer & Cummings, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 6th day of April, 1914.

(SEAL)

FRANK L. CROSBY,  
Clerk.

### CITATION

United States of America—ss.

The President of the United States to the United States of America and to Clay Allen, its attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office in the District Court of the United States, for the Western District of Washington, Northern Division, wherein Charlie Louie is plaintiff in error and you, the said United States of America, are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error

mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

Witness The Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States the Sixth day of January in the year of our Lord one thousand nine hundred and fourteen.

(Seal)

EDWARD E. CUSHMAN.  
United States District Judge for  
the Western District of Wash-  
ington, Northern Division.

Attest: FRANK L. CROSBY, Clerk.

Service of the within Citation and receipt of a copy thereof admitted this 6th day of January, 1914.

CLAY ALLEN,  
United States District Attorney.

Indorsed: Original. No. 2488. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Charlie Louie, et al., Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 6, 1914, Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Vanderveer & Cummings, Solicitors and counsel for Louie. Seattle, Washington.

### WRIT OF ERROR

United States of America—ss.

The President of the United States to The Honorable, The Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America, Defendant in Error, and Charlie Louie, Plaintiff in Error, which said cause is No. 2488 in the files and records of said Court, a manifest error hath appeared, to the great damage of the said Charlie Louie, Plaintiff in Error, as by their complaint appears.



We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf do command you, if judgment be therein given, that then under your seal distinctly and jointly you send the record and proceeding aforesaid with all things concerning the same to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, on the 5th day of February, 1914, next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness The Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States the Sixth day of January in the year of our Lord one thousand nine hundred and fourteen.

FRANK L. CROSBY,  
Clerk of the United States District Court, for the Western District of Washington, Northern Division.

Allowed By  
(Seal)

EDWARD E. CUSHMAN,  
United States District Judge,  
for the Western District of Washington, Northern Division.

sion.

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 6th day of January, 1914.

CLAY ALLEN,  
United States District Attorney.

O.K. CLAY ALLEN, Attorney for Plaintiff.

Indorsed: Original. Cause No. 2488. In the District Court of the United States for the Western District of Washington Northern Division, United States of America, Plaintiff, vs. Charlie Louie, et al., Defendants. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 6, 1914, Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Vanderveer & Cummings, Solicitors and counsel for Louie, Seattle, Washington.



No. 2403

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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CHARLIE LOUIE,  
Plaintiff in Error,  
vs.  
UNITED STATES OF AMERICA,  
Defendant in Error.

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Brief of Plaintiff in Error

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VANDERVEER & CUMMINGS,  
Attorneys for Plaintiff in Error.

Seattle, Washington:

**Filed**

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Press of Pliny L. Allen, Seattle, Washington

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SEP 4 - 1914

F. D. Monckton,

Clerk





No. \_\_\_\_\_

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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CHARLIE LOUIE,  
Plaintiff in Error,  
vs.  
UNITED STATES OF AMERICA,  
Defendant in Error.

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**Brief of Plaintiff in Error**

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VANDERVEER & CUMMINGS,  
Attorneys for Plaintiff in Error.

Seattle, Washington.





No. \_\_\_\_\_

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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CHARLIE LOUIE,  
Plaintiff in Error,  
vs.  
UNITED STATES OF AMERICA,  
Defendant in Error.

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**Brief of Plaintiff in Error**

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STATEMENT OF THE CASE

Insofar as it is material to the assignments of error which will be considered in the following pages, the history of the present case is as follows:

On April 2nd, 1913; an indictment was filed in the United States District Court for the Western

District of Washington, Northern Division, charging James A. Ralston and Charlie Louie with the offense of conspiring to import, conceal, transport and facilitate the concealment and transportation of certain opium. On the 15th of May, 1913, both were acquitted of this charge.

On the 12th of September, 1913, another indictment was returned into the same court charging Ralston as a principal and Louie as an accessory with a violation of the Act of February 6, 1909, commonly known as the offense of smuggling opium.

To the second, fourth, sixth and eighth counts of this indictment the defendant Louie pleaded the former acquittal. A demurrer to this plea was sustained. This ruling and the court's instructions to the jury upon the effect of the former acquittal, present the most serious errors in the record.

Upon the trial of this indictment the defendant Louie was found guilty upon the second count, and not guilty upon all the other counts. Thereafter he was sentenced upon said verdict to imprisonment for sixty days in the county jail and to pay a fine of five hundred dollars. This is the judgment now under review.

The other assignments of error have to do with the admission of certain evidence which will be referred to in the argument.

## ARGUMENT

### POINT I

THE COURT ERRED IN SUSTAINING THE DEMURRER TO THE PLEA OF FORMER ACQUITTAL.

The plea, which is set out at length on pages 10 to 17, inclusive, of the transcript, recites the returning of the former indictment, the joinder of issue and trial, and the verdict of not guilty. It also alleges that the persons are identical, the offenses identical, and that the judgment pronounced upon said verdict still stands unreversed. It would seem that a demurrer admitting these facts must necessarily be bad. The plea, however, sets forth the former indictment at length, and upon the assumption that the court may go behind the legal conclusions of the pleader in determining the identity of the offenses, we desire to consider the plea



on its merits in order that the court may arrive at a conclusion which will dispose of the matter finally.

For convenience we have paraphrased the material portions of the two indictments and arranged them in the form of a deadly parallel:

The material portions of the first indictment are as follows: "James A. Ralston and Charlie Louie did—conspire, confederate and agree—to receive, conceal, buy, sell and facilitate the transportation, concealment and sale—of—opium."

The plan of the conspiracy is then described about as follows: The defendant Ralston was to go to British Columbia and other places and import and deliver opium to the defendant Louie who was to pay for the opium and the cost of importing the same, pay Ralston certain compensation and retain the balance of the proceeds.

The last overt act is described as follows: "And during the continuance thereof, to effect the object thereof—James A. Ralston did on the 5th day of March, 1913, have in his possession and conceal—transport and facilitate in transporting and aid and assist in transporting 64 five-tael tins of opium."

The material portions of the second count of the second indictment upon which the defendant Louie was convicted, are as follows:

On the fifth day of March, 1913, James A. Ralston did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of — sixty-four five tael tins of opium — and — Charlie Louie did on said fifth day of March, 1913, wilfully, knowingly—aid, abet, counsel, command, induce and procure said James A. Ralston to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of said opium.

Before undertaking a further analysis of these indictments, we would call the court's attention to certain points of identity. In his seventh instruction, top of page 37 of the transcript, the court takes judicial notice that the opium involved in each case was the same. The overt act set out in our paraphrase of the conspiracy indictment, which is charged in almost the identical language of the second indictment, shows that the completed offense involved in the second indictment was committed during the conspiracy charged in the first.

The Federal statute under which the first indictment was returned, employs the word "conspire". Conspiracy is defined as a confederation or combination to effect certain purposes. These words impart the idea of cooperation, association or union, which is the very essence of the offense of conspiracy. It does not matter how informally it may be accomplished or expressed, any association or union of two or more persons for the purpose of committing an offense against the United States, is a criminal conspiracy under the Federal statute. Interpreting the first indictment in the light of this principle, it charges that the defendants Ralston



and Louie cooperated, associated and united themselves to receive, conceal, buy, sell and facilitate the transportation, etc. of opium, and pursuant thereto, on the 5th of March, 1913, Ralston had in his possession and concealed, etc. sixty-four five-  
tael tins of opium. The portions of the first indictment in which is outlined the plan of the conspiracy are merely descriptive, and although this descriptive matter may be essential to a good pleading, it is clear that without it sufficient facts are charged to constitute the offense of conspiracy. No variance in pleading descriptive matter can effect the question of jeopardy and for all present purposes it may be disregarded. See *Ball v. U. S.* 163 U. S. 662.

We would suggest that at this point the court compare our paraphrase of the second indictment with our analysis of the first indictment. If the offenses charged in these two indictments are not the same in everything but form, we submit the English language has become an instrument for concealing rather than expressing ideas. In the first case, the defendant was acquitted of the charge of cooperating, associating and uniting with Ral-

ston for the purpose of receiving, concealing, facilitating the transportation, etc. of opium. In the second case he was convicted of the charge of wilfully and knowingly aiding, abetting, counselling, commanding and procuring Ralston to do the same thing at the same time and in the same place. How could Louie be innocent of *any* association with Ralston and yet be guilty of *the particular* association charged in the second indictment ?

The authorities say that a plea of former acquittal is well taken when the evidence necessary to sustain the second charge would have sustained the first charge.

1 Wharton's Criminal Law, 11th Ed. Sec. 393.

Ex Parte Nielson, 131 U. S. 176.

*Ball v. United States*, 163 U. S. 662.

Just so surely as the general includes the specific, would the evidence that Charlie Louie wilfully and knowingly aided, abetted, counselled, commanded, induced and procured Ralston, have sustained the charge that he confederated, combined, associated or united with him.

The constitutional guaranty against double jeopardy is not a mere form to be evaded by sub-

terfuge or artful counsel, but is a substantial guaranty against unlimited prosecution, without which no man's liberty is safe. The two Supreme Court decisions already referred to, and the case of *People v. Stephens*, 21 Pac. Rep. 856, are fine examples, we believe, of the principles involved and of the spirit in which they should be applied.

Counsel will doubtless refer to cases in which it has been held that a prosecution for conspiracy does not bar a second prosecution for the completed offense. With all due respect to these authorities, many of which we believe are rather refined in their reasoning, we submit that they have no bearing upon the case at bar. Although a Federal statute may have abolished for certain convenient purposes the distinction between principal and accessory, the fact still remains that from the standpoint of substantive law there is still a distinction which is observed in the rules of criminal pleading and must be borne in mind in considering the sufficiency of this plea.

See *State v. Buzzell*, 58 N. H. 257.

*State v. Larkin*, 49 N. H. 36

Unless this distinction is recognized, the defendant in this very case is in the curious position



of having been acquitted upon the first count of this indictment of the very offense of which he was convicted on the second count.

The import of the decision in *People v. Stephens, supra*, is that a man may not be twice put upon trial for the same act either by charging the offense in different forms or by splitting it up into several parts. Yet that is exactly what was attempted in the case at bar as is evidenced by the court's seventh instruction, Tr. pages 36-38. We have already seen that the gist of conspiracy is "co-operation". The court's theory of the matter, as set out in this instruction on page 38, seems to have been that if Louie's "co-operation" did not "aid" Ralston, it constituted only the offense of conspiracy, whereas if it did aid Ralston it constituted two different offenses. We have always labored under the impression that the word "co-operation" necessarily involved the idea of "aid", an idea which has the sanction of every dictionary to which we have had access. It seems to us that nothing can more clearly betray the fallacy of the Government's position in this case than the logic, or lack of it, embodied in the court's seventh instruction to the jury.

## POINT II

## THE COURT ERRED IN ITS SEVENTH INSTRUCTION TO THE JURY

In preparing the transcript there seems to have been some confusion in numbering the instructions, from which it might appear that the eighth instruction, to which our exception on page 38 refers by number, had been omitted. In fact all that is omitted is the number, of the instruction, and the exception shows plainly to what instruction it refers. This error has already been sufficiently considered in the foregoing portion of the brief, and we will not refer to it further.

## POINT III

## THE COURT ERRED IN ADMITTING THE GOVERNMENT'S EXHIBITS 3 TO 9 INCLUSIVE AND 11 TO 13 INCLUSIVE.

These letters will be found at pages 55-59 of the transcript. The only foundation laid for their introduction is the testimony of Edward D. Lemarge, page 26 of the transcript, that he found them

on the 6th of March, 1913, in a trunk in the residence of the defendant Charlie Louie.

As noted in our objection on page 27 of the transcript, there is nothing to identify these letters with the defendant or with the offense for which he was on trial. It does not appear that they were written by him or to him or were ever received by him or seen by him. Only by inuendo can it possibly be contended that they refer to opium. Many of them are entirely undated; but the ones which are dated appear to have been written months prior to the commission of the offense with which the defendant was charged. In all seriousness it seems to us that one must strain his imagination to the utmost to conceive of a case in which the objection of immateriality were better taken. In admitting these letters the court stated that they had no tendency to prove the offense charged, but admitted them to prove the defendant's "knowledge and the means of knowledge, whether that will enable you at all to determine if the Government establishes that he had it in his possession whether it might have been accidentally or innocently." (page 27 of the transcript). We are not gifted with sufficient foresight to comprehend how letters written in the spring and



summer of 1912, could prove knowledge of a thing that did not occur for nearly a year afterward.

#### POINT IV

THE COURT ERRED IN ADMITTING THE TESTIMONY OF MAGGIE MACLEAN THAT SHE HAD SEEN THE DEFENDANT RALSTON CALL AT THE DEFENDANT LOUIE'S HOME DURING THE EARLY PART OF 1913.

The testimony in question is found on pages 29 and 30 of the transcript. On its face this testimony is obviously immaterial, and unless counsel can suggest some theory upon which it could be material to any issue in the case we will not discuss the question further.

## POINT V

THE COURT ERRED IN ADMITTING THE TESTIMONY OF A. B. HAMER, MARIAN BERGMAN AND EMMA FRIEDLAND REGARDING 6 CANS OF OPIUM FOR WHICH THE DEFENDANT LOUIE CALLED AT RALSTON'S ROOMS.

This testimony is found on pages 30 to 32 of the transcript. It was conceded by counsel and assumed by the court that this testimony related to transactions not involved in the indictment. (See tr. pp. 31, 32 and 33).

This evidence was admitted to prove the defendant's knowledge and intent. We respectfully submit that intent was not an issue. It was necessary and material to prove that the defendant had knowledge of certain things, to-wit: (1) that the opium was of foreign manufacture; (2) that it was prepared for smoking purposes; (3) that it had been unlawfully imported into the United States. If the former possession of the six cans could have proven these things, the evidence might have been admissible; but we would call the court's attention to the

fact that there was not a syllable of evidence to prove that the six cans referred to were either: (1) of foreign manufacture; or (2) prepared for smoking purposes; or (3) unlawfully imported into the United States. Without this, the evidence of the possession of these cans was immaterial and irrelevant, and its admission by the court was error.

We respectfully submit that having been once in jeopardy for this same offense, the cause should be remanded with instructions to dismiss the indictment.

Respectfully submitted,

VANDERVEER & CUMMINGS,  
Attorneys for Plaintiff in Error.





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IN THE  
**United States Circuit Court**  
**of Appeals**  
**For the Ninth Circuit**

CHARLIE LOUIE,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

No. 2403

**Brief of Defendant in Error**

---

CLAY ALLEN,  
*United States Attorney.*

ALBERT MOODIE,  
*Assitant United States Attorney.*  
Seattle, Washington.

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Smiley Litho. & Printing Co., 72 Columbia Street, Seattle

**FILED**

**SEP 11 1914**

**F. D. MONCKTON,**





IN THE  
**United States Circuit Court**  
**of Appeals**  
**For the Ninth Circuit**

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CHARLIE LOUIE,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

No. 2403

**Brief of Defendant in Error**

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STATEMENT OF THE CASE.

The issues offered in the present appeal are sufficiently narrow that they require no lengthy statement supplemental to that offered by counsel for plaintiff in error.

The plaintiff in error, Charlie Louie, was first indicted, together with one James A. Ralston, charged with conspiring to commit a crime against the United States, in violation of Section 5440 of the Revised Statutes of the United States. This indictment (p. 11 S. F.) contained but a single count and employed the usual and ordinary terms in description, charging that the defendants did "conspire, confederate and agree together to commit an offense against the United States." The crime which it is charged was to be perpetrated was that of "assisting in transporting and bringing into the United States" opium prepared for smoking in some quantity or amount not therein more fully described. After setting forth the object and means by which the conspirators had agreed to consummate the offense, the indictment sets forth nine separate overt acts. All of these overt acts, except two, allege specific acts, either of concealment or introduction by one or the other of the defendants of no less than five consignments of opium. A trial upon the charge of conspiracy having been had, the defendants were acquitted.

Thereafter another indictment embracing eight

counts was returned against the same defendants. The several counts of this indictment charged the violation of the Act of February 9, 1909, Chapter 100, Supplement 1909, p. 180, which prohibits the importation of opium.

The defendant Ralston thereafter entered his plea of guilty to a similar charge brought against him in the United States Court for the District of Oregon, and was sentenced to serve a term in the federal penitentiary at McNeil Island. The plaintiff in error was then tried upon the charges of the last mentioned indictment and a verdict of guilty was returned as to the second count. The plaintiff in error seeks to reverse the judgment of the court as based upon this verdict.

The evidence in the case disclosed a close and intimate friendship, extending over some months, between the defendants Louie, a Chinese, though of American birth, and Ralston, a white man. They had travelled together on extended trips to Chicago, Illinois, Butte, Montana, and Portland, Oregon, and upon one occasion they had visited the latter city and there the defendant Ralston registered under an assumed name. Louie had called up the other de-



fendant by telephone in Seattle and advised him that another Chinese would call Ralston up and tell him where he could get a consignment of opium. Ralston obtained a suit case and Louie and Ralston then traveled on the same train from Seattle to Portland, where both were arrested.

The letters referred to in the present record were found in the defendant Louie's trunk.

### ARGUMENT.

#### POINT I.

The first contention made by the plaintiff in error is to the effect that his acquittal by the jury of the charge laid in the conspiracy indictment should bar a subsequent prosecution for the consummated offense.

The contention of the plaintiff in error is not sustained by the decisions of the various courts to which similar questions have been presented. The attention of the court is directed to the opinion of Judge Bradford, speaking for the majority of the court in the case of *Berkowitz vs. United States*, 93 Federal 452, in which the facts quite nearly parallel the case at bar. Berkowitz and his alleged

co-conspirator were charged with violation of the conspiracy section (5440) of the federal code. The indictment charged the defendants with conspiring to violate a section of the penal code and alleged as overt acts the payment of money to five different persons. An acquittal having been had, Berkowitz was then charged with the direct offense of unlawfully selling, etc., false certificates, and *the same five persons are named*. It was there contended, as here insisted, that the facts were identical and that the acquittal as to the one offense should bar the prosecution for the other. But the majority of the court held to the opinion that the direct offense was not intended to be, and was not in fact, inclusive of the crime of conspiracy. It was there suggested that both were then, in fact, misdemeanors.

While the reasoning of the court, as we view it, is undoubtedly sound, there is yet a wider theory which sustains the court's position. The offense of conspiracy defined in Section 5440 is one *not inclusive* but *exclusive* of all other offenses. It begins with the formation of the criminal purpose and quite often falls short of the consummation of the stated offense. This section is designed to punish

the plotting and scheming of those wicked minds which show themselves, by a single overt act, ready to launch their unlawful enterprise. The agreement, the conspiring together, is itself the offense; the overt act is no part of it, as the supreme court has already declared.

Illustrations of inclusive classes of crimes occur readily to the mind. The crime of murder in the first degree is inclusive of all the varying degrees of murder, manslaughter and assault, for the consummation of the greater crime of murder means necessarily that all the lesser included offenses have been, at one and the same time consummated. When murder is committed, whether by blow or poison, the least of all crimes, a technical assault, is also committed. The latter is an included offense. It must be present. No such comparison can be made between a charge of conspiracy and that of introducing opium and aiding its transportation. Ralston and Louie may have conspired to introduce opium into the country unlawfully, and thereafter prepared a letter to forward their unlawful purpose. Through negligence the letter or opium might have miscarried and the arrangement thereby fail of consummation. They would still be guilty of a vio-



lation of the conspiracy section, and not guilty of the consummated offense. On the other hand, Louie might, upon his own initiative, and without the knowledge of Ralston and without any evidence of concert or conspiracy with any one, have set under way his enterprise, and Ralston thereafter assisted in the transportation of the opium without any actual knowledge of Louie's part in the matter, and both be guilty of the consummated offense.

The distinction contended for, on behalf of the government, is bluntly and definitely made in the case of *Britton vs. United States* (Okla.), 27 L. Ed. 699, 108 U. S. 199.

The court, speaking through Justice Woods, said:

“The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentie*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.”

Accepting the rule of the supreme court, the

conspiracy indictment here is stripped of every allegation as to specific acts, and becomes a general charge of conspiracy to unlawfully import opium in some amount neither mentioned nor described.

The attention of the court is further called to the case of *United States vs. Scott*, 139 Federal 697.

In the *Scott* case the question arose as to Sections 5440 and 3296, the latter imposing a penalty for removing distilled spirits in violation of law. The penalty under the latter section was by fine and imprisonment for a period of not less than three months nor more than three years, while the conspiracy, then as now, was punishable by imprisonment for any period not more than two years. The court holds both offenses to be misdemeanors and states: "It is perfectly clear that the rule of merger does not apply here, where the penalty is so nearly alike as it is under Sections 5440 and 3296."

In the case at bar the punishment provided for smuggling is practically identical with that provided for the crime of conspiracy; that is, not in excess of two years imprisonment. Since, however, the Act of March 4, 1909, Section 335, Penal Code,

both of these offenses would be described as felonious. That section provides:

“All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonious. All other offenses shall be deemed misdemeanors.”

It was formerly contended, early in the history of conspiracy litigation, that a defendant could not be charged and tried for conspiracy where the offense was actually consummated. Courts quite generally, however, repudiated the doctrine of merger and permit the charge as to either.

*People vs. Peterson*, 31 Northwestern 188.

*Wait vs. Commonwealth*, 69 S. W. Rep. 697,  
(Court of App., Ky.)

*Regent vs. People*, 96 Ill. App. 189.

*Graff vs. People*, 70 Northeastern 299-303,  
(Supreme Court Illinois).

Judge Ricks here speaking for the court with reference to suggested “merger” of the crime of conspiracy into the consummated offense, says:

“And it is believed that, by the greater weight of authority, the rule of merger, as formerly existing at common law, has been to a great extent abrogated, and confined to very narrow limits.”



Counsel for plaintiff in error have cited *Wharton on Criminal Evidence*. The attention of the court is directed to the statement of the same text-writer, found at page 508, First Volume, Eleventh Edition, quoted in part as follows: “*On plea of former acquittal or conviction, the accused must show that he was acquitted or convicted of the same accusation against him in a former trial; not of an entirely different offense growing out of the same state of facts or transaction.*” (Writer’s italics.)

Wharton cites among other cases that of

*Hooper vs. State*, 30 Texas Appeals 411, 28 American St. 927.

Hooper had been tried and acquitted of uttering or passing a forged instrument. He was re-indicted for forgery of the same instrument. We quote from Mr. Justice White:

“The forgery of an instrument and the passing of a forged instrument are two separate and distinct offenses as denounced by our code, and separate penalties are affixed to the commission of the two offenses. *Under an indictment for forgery, a party cannot be convicted and punished for passing a forged instrument, and vice versa.*”

While there is no statement by the court, it is

quite apparent that the evidence on both trials was substantially the same. Proof of the false character of the instrument was essential to each charge.

Mr. Justice White also emphasized that in order for defendant to avail himself of the defense of *autrefois acquit* “proof must be made by showing the identity of the very acts or omissions which constitute the offense—that the acts which constitute the offense for which the former acquittal was had are the very acts which constitute the offense on trial.”

In *State vs. Williams*, 12 So. 932, defendant was charged with grand larceny of goods belonging to a Miss Waters. He plead former acquittal, on a charge of grand larceny of the identical goods, alleged to be the property of a Mr. Waters. Justice Fenner of the supreme court of Louisiana held that the test on plea of former acquittal is whether the evidence necessary to support the second indictment would have sustained a legal conviction on the first, and denied the plea, saying that the evidence in the second case would have acquitted in the first.

It is respectfully submitted that in the case at bar there is nothing in this transcript to show that

any evidence relative to the 64 five-tael tins described in the count (two) upon which Louie was convicted at the last trial was ever mentioned, or evidence offered relative to that transaction in the conspiracy trial. It will be remembered that the conspiracy indictment in the overt acts alone reference is made to no less than *five different* quantities of opium, as well as other overt acts. Proof of any one of these would have been sufficient to "make good" the evidence in the conspiracy case, and the record is silent, both as to pleadings and evidence on the point as to the evidence used on that occasion. In other words, the plaintiff is complaining of a "deadly parallel" as to words used in the two indictments, while in fact the true rule, under the most liberal construction, is *as to the evidence offered in each case*.

Counsel have cited for consideration by the court the case of *Ball vs. United States*, 163 U. S. 662, 41 L. Ed. 300. The defendant, Ball, was indicted, tried and acquitted by a jury, the indictment thereafter having been held defective. The defendant was then re-indicted and tried, and the supreme court held the former acquittal a bar to a new in-



dictment for the same offense, charging the same crime. The crime charged in each case was murder. The facts relied upon were the same, with additional proof of the time of the victim's death. In the case at bar neither the charges nor the facts are the same.

The case of *Ex Parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118, cited by counsel, is illustrative of the class of included offenses. The defendant Nielsen was charged with the continuing offense of unlawful cohabitation. A plea of guilty having been entered, the sentence imposed was held to be a bar to charges of single acts of adultery. The court states, "It included the adultery charge."

#### POINT II.

It will not be necessary to consider this point separately inasmuch as it is covered by the discussion of Point I.

#### POINT III.

The third point submitted in the brief of plaintiff in error is in regard to the introduction of certain letters in evidence. These letters, sixteen in number, are set out from pages 54 to 61, inclusive,

of the transcript herein. The history of these letters varies in certain instances. The testimony of Guy M. Watkins, called on behalf of the government (p. 26 Tr.) was that he had arrested Charlie Louie on the night of July 5th (1913), and thereafter had taken him to Watkins' office for the purpose of an examination. The witness further states that preliminary to the search Louie walked back and forth close to the wardrobe in the room, and during this period of time the witness was busy searching certain trunks belonging to the defendant Ralston, with his back turned to the defendant Louie. While the record does not so state, it was apparent that something had aroused the suspicion of the witness, and after searching Louie and finding nothing upon him he made a search in the bureau referred to and there found the exhibits 1 and 2. Attention is called to the fact that these exhibits, which it was entirely reasonable for the jury to conclude had but recently come from the person of Louie, make reference to "foreign goods in this place is 28 to 28½ at present. Please let me know as to the market in your city," etc.

The witness, Edward D. Lemarge (p. 26 Tr.),

testified that exhibits 3 to 9, inclusive, and 11 to 13, inclusive, together with their respective envelopes, had been found by him on the 6th of March, 1913, in a trunk in the residence of the defendant Louie.

The transcript does not clearly disclose the facts relative to the admission of these various letters. The situation as developed in the trial is briefly this:

The letters 1 and 2 found in the wardrobe had been admitted by the court and the other letters were first offered in evidence and rejected by the court, and were not admitted during the government's case in chief. After the government had rested and the defendant Louie was called on behalf of the defense, he stated in his direct examination by his counsel that he had never handled opium. The court very properly permitted counsel for the government to cross-examine Louie with reference to these letters. Louie then admitted that all those letters admitted in evidence were either written by him or to him, and upon the basis of this statement they were admitted into the record by the court.

The transcript as proposed and certified shows



that exhibit 14 was offered in evidence (p. 28 Tr.) and objected to as immaterial, irrelevant and incompetent. There is no other or further objection, and it is safe to assume that being so general in its character no right is preserved to the defendant.

It is suggested by counsel for plaintiff in error that there is nothing to identify these letters with the defendant or with the offense for which he was on trial. Counsel makes a further suggestion that only by innuendo can it possibly be contended that they refer to opium. In that connection the attention of the court is called to certain interesting phases generally found and recurring in these various letters, such as:

“\* \* \* not first class goods, but like sweet liquid.”

“\* \* \* who bought 30 tins, selling price \$24.50 each tin,” etc.

“\* \* \* brought 60 tins, selling price \$24.75 each tin.”

“\* \* \* black goods on hand at present,” etc.

“\* \* \* and do not buy the sweet liquid.”

The court will read these letters with some in-

terest and probably some amusement that it can be suggested that an intelligent man conversant with the habits and customs of Chinese people could ever be at a loss to know the subject matter of this generally ingenious Chinese correspondence.

It is sometimes the disposition of counsel to assume that courts are less intelligent than the average run of humanity. We must assume that the trial court and this appellate tribunal are generally conversant with the habits of the Chinese people within their district. The Chinese people are the great merchants of the world, and the singular fact that fourteen or fifteen letters are written without mentioning the particular commodity or goods which is the subject matter of the conversation is in itself so significant a fact that it causes no surprise that a jury should consider the subject matter to be that staple commodity which is itself "handled in tins," is somewhat like "sweet liquid," and is "black goods" generally worth in this market from \$18.00 to \$30.00 per tin.

The transcript is not complete and does not set forth the numerous bits of evidence which weave this case closely around the defendant Louie. The

purchase by Louie and Ralston of a trunk in which opium was transported; the traveling to and fro with Ralston; the visits to the home of the witnesses Marian Bergman and Emma Friedland; and mysterious telephonic communication by Louie to Ralston telling that he will be advised "where to go and get the stuff"; the statement of Ralston that pursuant to these mysterious instructions so given he had gone to a certain spot and there secured opium contained in a sack; that the opium was the same opium which was carried in the trunk, checked on the very trip taken by Louie and Ralston to Portland; and the sack produced in the court room was the very sack which had contained the opium obtained in this mysterious way pursuant to the suggestion of Louie. All these are necessary facts for the court to know in order that it may have a clear understanding of the meaning of some of the letters offered as exhibits. The letter signed "Your Chas." and written to his wife was a letter which Louie admitted he had sent by mail to his wife, and which was afterwards found in a trunk in his home.

With these facts before the court, no extended argument is necessary to justify the admission of



each and all of the exhibits offered in evidence. The rule of law which permits the offer in evidence of facts relative to other misdemeanors or similar occurrences is too well known to require voluminous citations. It is apparent that whenever motive, intent, knowledge or identity are questions necessary to be proven, that evidence as to other offenses of similar character may be shown. In the case at bar the evidence showed the association and contact with Ralston and the doing of certain things which might or might not be harmless or criminal. If Louie had no wrong intent when he insisted in purchasing a trunk or no wrong intent in his telephone message to Ralston telling him of the mysterious telephone call to come, then he would not be guilty of this offense. If, on the other hand, he had from time to time handled opium and had on other occasions engaged in the barter and sale of this drug, it becomes evidence conclusive in its character as to his motive and purpose in this particular transaction.

*Jones* in his excellent work on evidence in Volume I, p. 726, says:

“Thus on trials for uttering counterfeit

bills or coin and forged instruments, it has long been the practice to admit evidence of the uttering of similar counterfeit money or forgeries to other persons about the same time, for while in a single case the uttering of counterfeit money might be perfectly consistent with innocence, the probabilities of guilty knowledge rapidly increase on proof of a continued dealing in the unlawful money."

The same rule obtains with reference to all similar offenses where the motive of the defendant becomes an integral part of the crime itself. No discussion of the authorities on this subject is necessary.

Special reference is made to the case of *People vs. Molineux*, 62 L. R. A. 193, 168 N. Y. 264, the leading case on admission of evidence of other offenses, which has exhaustive notes appended. Also see—

*Commonwealth vs. Scott*, 25 Am. R. 81, 123 Mass. 222.

*Thiede vs. Utah*, 40 L. Ed. 242, 159 U. S. 517.

*Clune vs. U. S.*, 40 L. Ed. 269, 159 U. S. 590.

*State vs. Hennessey*, 5 S. W. 215, 14 Cen. Dig., Sec. 822-5, 6 Sec. Dig., Sec. 369, et seq.

#### POINT IV.

The testimony of Maggie McLean was admis-

sible to show the relations existing between Ralston and defendant Louie, and to negative the idea of casual acquaintance. Its admission could not be considered prejudicial error in any event.

#### POINT V.

The testimony of Hamer, Marian Bergman and Emma Friedland was admissible for the reasons hereinbefore last mentioned. Ralston was living, or occasionally staying, at the home of these two women witnesses. Louie kept constantly in touch with Ralston through the telephone of one of the witnesses. Louie visited there and, unless practically all the authorities are wrong, the relation existing between Ralston and Louie was a question of prime importance for the jury in its deliberations.

In *Clune vs. U. S.*, 40 L. Ed. 269, 159 U. S. 590, the court was called to pass upon a bill of exceptions and statement of facts which, in incompleteness, presented a problem almost as difficult as the present case. The court said:

“Where a case rests upon circumstantial evidence, much discretion is left to the trial court, and its rulings admitting such evidence will be sustained if the evidence admitted tends even remotely to establish the ultimate fact.”



Citing 34 L. Ed. 954; 37 L. Ed. 118; 37 L. Ed. 996; 40 L. Ed. 237.

The defendant was accorded a fair trial and the conviction should be sustained.

Respectfully submitted,

CLAY ALLEN,

*United States Attorney.*

ALBERT MOODIE,

*Assitant United States Attorney.*

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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ARTHUR H. BRANDT, as Trustee of the Estate of  
F. S. MAYHEW, Bankrupt,  
Petitioner,

vs.

F. S. MAYHEW and Mrs. F. S. MAYHEW, Hus-  
band and Wife,  
Respondents.

---

In the Matter of F. S. MAYHEW, in Bankruptcy.

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Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of  
Law, of a Certain Order of the United  
States District Court for the North-  
ern District of California,  
First Division.

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FILED

MAY 19 1914





No. 2421

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ARTHUR H. BRANDT, as Trustee of the Estate of  
F. S. MAYHEW, Bankrupt,  
Petitioner,

vs.

F. S. MAYHEW and Mrs. F. S. MAYHEW, Husband and Wife,  
Respondents.

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In the Matter of F. S. MAYHEW, in Bankruptcy.

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Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of  
Law, of a Certain Order of the United  
States District Court for the Northern District of California,  
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Petition for Revision.]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 7659.

In the Matter of F. S. MAYHEW,

Bankrupt,

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Arthur H. Brandt, trustee of the estate of F. S. Mayhew, bankrupt, respectfully shows unto this Court:

That on, to wit, the 17th day of October, 1912, a petition was filed in the District Court of the United States, Northern District of California, First Division, in involuntary bankruptcy against F. S. Mayhew; that thereafter and, to wit, on the 8th day of October, 1912, said F. S. Mayhew was, by order of said Court, adjudicated a bankrupt and the matter of his estate referred to Armand B. Kreft, Esq., Referee at San Francisco, for administration.

That on, to wit, the 13th day of December, 1912, the first meeting of the creditors of said F. S. Mayhew was held and your petitioner herein was duly elected trustee of said estate; that he thereupon qualified as such trustee and ever since has been and now is the duly elected, qualified and acting trustee of the estate of said bankrupt.

That on, to wit, the 10th day of January, 1913, your petitioner as such trustee filed in said Court his inventory of the property of the estate of said bankrupt; that said inventory included as an asset of the

estate of said bankrupt certain real property, with the improvements thereon, situated in the County of San Mateo, State of California.

That thereafter, and, to wit, on the 17th day of February, 1913, said F. S. Mayhew filed in said Court his Schedules of his creditors and of his property; that in said Schedules, under the heading provided for therein, he made claim to an exemption of \$5,000 in value of the real property, and the improvements thereon, situated in San Mateo County, California, theretofore included in the inventory filed by your petitioner as such trustee.

That subsequent to the adjudication in bankruptcy of said F. S. Mayhew, and, to wit, on the 4th day of November, 1912, Mrs. F. S. Mayhew, the wife of said bankrupt, recorded in the office of the County Recorder of San Mateo County, California, a declaration of homestead upon the real property and improvements hereinabove referred to, under and pursuant to the laws of the State of California; that thereafter, and, to wit, on the 20th day of November, 1912, she filed her petition for an order setting apart as exempt the dwelling-house and the land upon which she had filed said declaration of homestead.

That prior to the adjudication in bankruptcy of said F. S. Mayhew, and prior to the filing of the petition against him in involuntary bankruptcy, and on, to wit, the 18th day of April, 1912, the bankrupt and his said wife had conveyed the real property herein referred to to one Willard O. Wayman, for the benefit of the creditors of said F. S. Mayhew; that said transfer and conveyance was the act of bankruptcy



charged by the petitioning creditors and upon which the adjudication in bankruptcy was obtained; that said Willard O. Wayman, after the appointment of your petitioner as trustee herein, and on, to wit, the 20th day of December, 1912, transferred and surrendered the property so conveyed to him by said F. S. Mayhew to your petitioner, as trustee.

That your petitioner, as such trustee, declined and refused to set aside the claim of said F. S. Mayhew for said homestead exemption; that on, to wit, the 2d day of February, 1914, the Referee duly gave and entered his order granting and allowing the claim of said F. S. Mayhew to said homestead exemption, and ordering and directing the trustee to set aside said homestead exemption claimed by said bankrupt to the value of \$5,000 and to pay and deliver said sum to said bankrupt out of and from the proceeds of the sale of said real property when said sale should have been made.

That thereafter, and, to wit, on the 5th day of February, 1914, your petitioner as trustee filed his petition for the review of said order granting and allowing the claim of said bankrupt to said homestead exemption, a copy of which said petition for review, duly certified by the Clerk of said District Court, is hereto attached marked Exhibit "A"; that thereupon, and, to wit, on the 11th day of February, 1914, said Referee duly certified the questions involved to said District Court; that a copy of said certificate of the Referee on petition for review, duly certified by the Clerk of said District Court, is hereto attached marked Exhibit "B"; that said certificate

of said Referee sets out all of the facts herein enumerated, concerning which there is no controversy.

That thereafter, and, to wit, on the 7th day of May, 1914, by order of the said District Court duly made and entered on said day, the order of said Referee granting and allowing the claim of said bankrupt to said homestead exemption in the value of \$5,000 was affirmed; that a copy of said order of said District Court, duly certified by the Clerk of said District Court, is hereto attached marked Exhibit "C."

Your petitioner charges the fact to be that said District Court erred as a matter of law in affirming the order of said Referee in granting and allowing said bankrupt's claim to said homestead exemption; that on the facts as certified by said Referee said Bankrupt was not entitled to said homestead exemption for the following reasons, to wit:

1. That said bankrupt had not prior to the filing of the involuntary petition in bankruptcy against him, or prior to his adjudication as a bankrupt, made or recorded a declaration of homestead under and pursuant to the laws of the State of California, said homestead being claimed for the first time by said bankrupt upon the filing of his Schedules, some four months after his adjudication.

2. That by the conveyance of said bankrupt and his said wife, to said Willard O. Wayman, on the 18th day of April, 1912, said bankrupt had parted with all his right, title and interest in and to said real property, and that by reason thereof said bankrupt had no right, title or interest in said real property at the date of his adjudication as a bankrupt out of

which he could claim a homestead exemption.

WHEREFORE, your petitioner as said trustee, feeling aggrieved because of said order of said District Court, asks that the same may be revised in matter of law by this Honorable Court as provided in Section 24B of the Bankruptcy Act; and the rules of practice in such cases provided, and that the said order may be reversed, and for such other and further relief as may be just and proper.

Dated May 11, 1914.

R. H. CROSS,  
Attorney for Trustee of said F. S. Mayhew, Bankrupt and Petitioner.

State of California,  
City and County of San Francisco,—ss.

I, Arthur H. Brandt, trustee of the estate of F. S. Mayhew, bankrupt, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements therein contained are true according to the best of my knowledge, information and belief.

ARTHUR H. BRANDT.

Subscribed and sworn to before me this 11th day of May, 1914.

[Seal] HORTENSE GARDNER,  
Notary Public in and for the City and County of San Francisco, State of California.



*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 7659.

In the Matter of the Estate of F. S. MAYHEW,  
Bankrupt.

**Praeipce [for Transcript of Record for Use on  
Petition for Revision].**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled matter to be used on petition for revision of Arthur H. Brandt, trustee, of the order of the above-entitled court duly made and entered on May 7th, 1914, affirming the order of the Referee granting and allowing the claim of the above-entitled bankrupt to a homestead exemption, by the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following documents:

1. This Praeipce.
2. Petition for Review of Order of Referee.
3. Certificate of Referee on Petition to Review.
4. Order Affirming the Order of said Referee.

Dated May 11, 1914.

R. H. CROSS,

Attorney for Arthur H. Brandt, Trustee.

[Endorsed]: Filed May 11, 1914, at 11 o'clock and 15 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [1\*]

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\*Page-number appearing at foot of page of original certified Record.

**[Exhibit "A" to Petition for Revision.]**

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 7659—IN BANKRUPTCY.

In the Matter of the Estate of F. S. MAYHEW,  
Bankrupt.

**Petition by Trustee to Review Order Allowing Claim  
of Bankrupt to Homestead Exemption.**

The petition of Arthur H. Brandt, trustee of F. S. Mayhew, bankrupt, respectfully shows:

That heretofore, and, to wit, on the 8th day of October, 1912, F. S. Mayhew was duly adjudged a bankrupt by order of this court; that thereafter, and, to wit, on the 13th day of December, 1912, your petitioner was chosen and elected trustee of the estate of said bankrupt, and ever since said date has been and now is the duly elected, qualified and acting trustee of the estate of said bankrupt.

That heretofore, and, to wit, on the 17th day of February, 1913, said bankrupt filed herein his Schedules pursuant to subdivision 8 of section 7 of the Bankruptcy Act; that in and by said Schedule, he claimed as exempt a homestead of the value of \$5,000.00, out of that certain real property situated in the County of San Mateo, State of California, and listed and described in said Schedules, under and pursuant to the provisions of Title V of the Civil Code of the State of California; that your petitioner as trustee of said estate, objected to the granting of said claim of homestead exemption.

That thereafter the claim of said bankrupt to said homestead exemption came regularly on to be heard before the Referee upon the claim therefor contained in the Schedules of said bankrupt, and the objections thereto of your petitioner as trustee, and [2] evidence, oral and documentary, having been heard with reference thereto, said Referee on the second day of February, 1914, duly made and filed an order granting and allowing said claim of homestead exemption, and instructing your petitioner as trustee to set aside said homestead exemption of the value of \$5000.00, and to pay and deliver said sum of \$5000.00 to said bankrupt out of and from the proceeds of the sale of said real property, when said sale shall have been made; that a copy of said order is attached hereto, marked Exhibit "A" and made a part hereof.

That your petitioner claims that said F. S. Mayhew is not entitled to claim a homestead exemption out of said real property in the amount of \$5000.00 or any sum, for the reason (1) that said bankrupt did not file his Schedules until the 17th day of February, 1913, more than ten days after his adjudication as a bankrupt, contrary to the provisions of Subdivision 8 of Section 7 of the Bankruptcy Act; (2) for the further reason that neither said bankrupt nor his wife had recorded any declaration of homestead on said real property prior to the adjudication in bankruptcy of said F. S. Mayhew, and (3) for the further reason that prior to the adjudication in bankruptcy of said F. S. Mayhew, on the 8th day of October, 1912, said bankrupt and his wife had made, executed



and delivered to one Willard O. Wayman, a deed of conveyance conveying to said Willard O. Wayman, all their right, title and interest in and to said real property, which said conveyance was made either as a preference or for the benefit of said bankrupt's creditors; that said Willard O. Wayman, on the 20th day of December, 1912, transferred and surrendered to your petitioner, as trustee, said real property.

Your petitioner therefore avers that the ruling and order of said Referee allowing said claim for homestead exemption, and instructing your petitioner as trustee to set aside said homestead exemption to the value of \$5000.00, and to pay and deliver that sum to said bankrupt out of and from the proceeds of the sale of said real property when said sale shall have been made, was erroneous and that no order should have been made by said Referee allowing [3] said claim for homestead exemption.

That your petitioner desires a review by the Judge of this court of the aforesaid order made by said Referee, and files this petition therefor, and he therefore prays that the error complained of and the questions of law and fact raised before the said Referee and decided by him, may be certified by said Referee to the Honorable Maurice T. Dooling, Judge of the District Court of the United States, Northern District of California, First Division, to the end that he may review said order and make and enter an order, or direct the Referee to make and enter an order holding and deciding that said bankrupt is not entitled to said homestead exemption, and denying and disallowing his claim therefor.

And your petitioner ever prays.

ARTHUR H. BRANDT,  
Petitioner.

R. H. CROSS,  
Attorney for Petitioner. [4]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

I, Arthur H. Brandt, the petitioner mentioned and described in the foregoing petition, do hereby make oath that the statements therein contained are true to the best of my knowledge, information or belief.

ARTHUR H. BRANDT.

Subscribed and sworn to before me this 5th day of February, 1914.

[Seal] HORTENSE GARDNER,  
Notary Public in and for the City and County of San Francisco, State of California. [5]

EXHIBIT "A."

*In the District Court of the United States, Northern District of California, First Division.*

No. 7659—IN BANKRUPTCY.

In the Matter of the Estate of F. S. MAYHEW,  
Bankrupt.

**Order Allowing Bankrupt's Claim to Homestead Exemption.**

The claim of F. S. Mayhew, the above-entitled bankrupt, to a homestead exemption out of that certain real property situated in the County of San Mateo, hereinafter described, to the value of \$5000.00,

coming on regularly to be heard before the Referee upon the claim of said exemption contained in the Schedules filed by said bankrupt herein, and the objections thereto of the trustee, and evidence, oral and documentary, having been heard with reference thereto,

And it appearing that heretofore, and, to wit, on the 17th day of February, 1913, said F. S. Mayhew, said bankrupt, filed in the above-entitled court, his Schedules as required by the Bankruptcy Act wherein and whereby he claimed as a homestead exemption, \$5000.00 in value of the real property situated in San Mateo County, California, and hereinafter more particularly described, under and pursuant to the provisions of Title 5 of the Civil Code of the State of California,

And it further appearing that the house and building on said real property was at and prior to the date upon which said F. S. Mayhew was adjudicated a bankrupt by order of the above-entitled court, occupied by said bankrupt and his family as a dwelling-house.

And it further appearing that heretofore, and, to wit, [6] on the 8th day of March, 1913, the Referee duly made and entered his order herein authorizing and directing the trustee to sell the real property hereinafter described, free and clear of all liens and incumbrances, and all and singular the law and facts being duly considered.

NOW, THEREFORE, it is hereby ordered that the claim of said F. S. Mayhew, said bankrupt, to a homestead exemption of \$5000.00 in value of said



real property, be and the same is hereby granted, and the trustee herein is instructed to set aside said homestead exemption claimed by said bankrupt to the value of \$5000.00, and to pay and deliver said sum to said bankrupt out of and from the proceeds of the sale of said real property when said sale shall have been made. The real property herein referred to is particularly described as follows, to wit:

Commencing at a point in the center line of Isabel Avenue, which said point is ascertained and located by running South 31 degrees 54' West, 22.19 chains from monument set at the most easterly corner of Lot No. 1 of Valparaiso Park and thence south 50 degrees 20' east, 3.18 chains from said point of commencement, running on and along said center line of Isabel Avenue south 32 degrees west, 5.42 chains; thence leaving said center line of Isabel Avenue and running north 50 degrees 20' west, 7.38 chains to a stake in the southeast fence line of the land of Moulton; thence on and along said fence line north 31 degrees 54' east, 5.42 chains to fence corner and lands of Winchester; thence on and along the southwest boundary of said lands of Winchester; thence on and along the southwest boundary of said lands of Winchester south 58 degrees 20' east, 7.31 chains, containing 4 acres.

Dated January 29, 1914.

ARMAND B. KREFT,

Referee.

[Endorsed]: Filed Feb. 2d, 1914, 10 A. M. A. B. Kreft, Referee. [7]

Receipt of a copy of the within petition is hereby admitted this —— day of February, 1914.

ERNEST R. LITTLE,  
Attorney for F. S. Mayhew.

[Endorsed]: Filed Feb. 5, 1914, 3 P. M. A. B. Kreft, Referee. [8]

**[Exhibit "B" to Petition for Revision.]**

*In the District Court of the United States, Northern  
District of California, First Division.*

Before ARMAND B. KREFT, Referee in  
Bankruptcy.

No. 7659.

In the Matter of F. S. MAYHEW,  
Bankrupt.

**Certificate of Referee on Petition to Review.**

To the Honorable, MAURICE T. DOOLING, Judge  
of the District Court of the United States,  
Northern District of California:

The undersigned, referee in bankruptcy, to whom  
was referred the above-entitled matter, respectfully  
certifies and reports:

That on January 29th, 1914, an order was made  
herein allowing the bankrupt's claim to a homestead  
exemption to the amount of \$5,000 in certain real  
property described in the bankrupt's schedules. The  
trustee, feeling aggrieved thereat, on February 5th,  
1914, filed a petition to review. The facts are as  
follows:

On August 17th, 1912, a petition was filed in invol-  
untary bankruptcy against the said F. S. Mayhew,

and he was adjudicated a bankrupt on October 8th, 1912. On November 4th, 1912, Mrs. Mayhew, the wife of the bankrupt, recorded with the county recorder of San Mateo County a declaration of homestead upon the property in question. On December 13th, 1912, the first meeting of creditors was held herein, and Arthur H. Brandt was elected trustee. On January 10, 1913, the trustee filed an inventory of the property of the estate of the bankrupt, including the property in question. For some time after the filing of the petition and after the adjudication the whereabouts of the bankrupt was unknown to the petitioning creditors, and the first meeting of creditors was [9] called upon a list of creditors furnished by the petitioning creditors. Later, the bankrupt made his appearance, and on February 17, 1913, he filed his schedules of his creditors and of his property, in which schedules, under the proper heading, he claims an exemption of \$5,000 in value of real estate situated in San Mateo County, and upon which his wife had filed a declaration of homestead. The trustee has refused to set aside the claim of exemption.

On November 20, 1912, Mrs. Mayhew filed a petition for an order setting apart as exempt the dwelling-house and the land upon which she had filed a declaration of homestead; and the bankrupt having later filed his schedules and claimed a homestead exemption therein, the petition of Mrs. Mayhew was considered together with the bankrupt's claim; and on the allowance of the bankrupt's claim to the homestead the petition of Mrs. Mayhew was denied.



On the 18th day of April, 1912, the bankrupt and his wife conveyed the property in question to one Willard O. Wayman for the benefit of the creditors of the bankrupt. This transfer is the act of bankruptcy charged by the petitioning creditors, and upon which the adjudication was obtained. Said Wayman, after the appointment of the trustee herein, and on the 20th day of December, 1912, transferred and surrendered the property so conveyed to him, to the trustee.

Two questions are presented:

(1) No statutory homestead under the laws of the State of California having been made and recorded prior to the filing of the petition herein or prior to adjudication, said homestead having been claimed for the first time by the bankrupt upon the filing of his schedules, about four months after the adjudication, is the bankrupt entitled to the claimed exemption?

(2) Did the bankrupt, by the conveyance to Willard O. Wyman prior to the filing of the petition herein, part with all title and interest in said property so that the trustee takes title thereto from said Willard O. Wyman? [10]

The question as to the right of the bankrupt to have set apart to him in a bankruptcy proceeding where he has not, prior to the commencement of the bankruptcy proceedings filed a statutory declaration of homestead under the State law, has been decided by this court in the cases of *In re Joseph Schwartz*, 5906, and *In re R. McCoy and Son*, 5536, which cases were decided by Judge Bean, who affirmed the rul-

ings of the referee Milton J. Green upon petitions to review.

In the case of Joseph Schwartz it was held that the provisions of the insolvency law of the State of California, Article 10, Paragraph 64 of the Insolvency Act of 1895 relating to homesteads, were not suspended by the National Bankruptcy Act. Said Insolvency Act contains the following provision:

“It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of said insolvent, such real and personal property as is, by law, exempt from execution; and also a homestead, in the manner provided in Section one thousand four hundred and sixty-five of the Code of Civil Procedure.”

The section of the Code of Civil Procedure made applicable by the foregoing section of the Insolvency Act is the section relating to homesteads in probate proceedings. It has therefore been decided by this court that the bankrupt is entitled to a homestead to be set aside to him in bankruptcy proceedings although he has not complied with the provisions of Section 1262 of the Civil Code of this State relating to homesteads.

In the case of McCoy and Son, *supra*, this question was briefed at length and fully considered. Counsel for the trustee in the case at bar makes reference to the briefs filed in the case of McCoy and Son.

I hold, however, that the question is not open for further consideration as to the bankrupt's rights to

the homestead claim, except as to the effect of the amendment of 1910 to Section 47—a relating to the trustee's title, which reads as follows:

“Such trustee, as to all property in the custody or coming into the custody of the bankruptcy courts, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights and powers of a judgment [11] creditor holding an execution duly returned unsatisfied.”

In the case of Schwartz the referee in his opinion uses the following language:

“The books are full of decisions holding that exemption laws should be liberally construed by the courts; and unless some adverse interest has intervened, this court, to effectuate justice and to secure to the bankrupt a homestead for the use of himself and family dependent upon him, should not strictly construe laws which were passed for the benefit of an insolvent debtor. The trustee is not a purchaser for value, nor does he stand in the position of a judgment creditor.”

By the amendment quoted the trustee does stand in the position of a judgment creditor. A judgment creditor holding a lien upon the property, such lien would take precedence over any declaration of homestead which the bankrupt might thereafter file.

Section 6 of the Bankruptcy Act reads:



“(a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.”

Section 70-a provides that the trustee shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except so far as it is to property which is exempt, etc.

This Court having held that the homestead exemption provision of the state insolvency law is a law in force, it is therefore an allowance to the bankrupt which under section 6 of the Bankruptcy Act “This Act shall not affect.” If the trustee is given the rights of a lien creditor as provided by section 47 a, as amended, the rights of the bankrupt to the exemptions would be affected, for this Court could not grant a homestead out of property on which a creditor held a valid lien. A construction of the amendment which would defeat the homestead right would be in conflict with provisions of section 6 which says, this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force. In my opinion the provisions of Sec. 6 are controlling, and the amendment must be construed as if it read, such trustee shall be deemed vested with the rights of a lien creditor except as to property exempt to the bankrupt under Sec. 6.

As to the conveyance of this property to Willard O. Wayman [12] as an assignee for the benefit of

creditors, in my opinion such assignment only creates a trust, and not having been executed, the same falls upon the adjudication in bankruptcy. The testimony of the bankrupt was to the effect that this conveyance was made to secure his creditors. Such conveyance was either under an assignment for the benefit of all creditors, or, if for the benefit of certain creditors with intent to prefer, and which property could be recovered by the trustee. The testimony is of a somewhat indefinite character as to the facts concerning this assignment. My inference from the testimony was that it was intended to be for the benefit of all creditors. The petitioning creditors allege as the act of bankruptcy that the said F. S. Mayhew on the 18th day of April, 1912, made a general assignment to one Willard O. Wayman for the benefit of his creditors, of all his property on that day owned by said F. S. Mayhew. Considered from the standpoint of a preference, the question as to whether a bankrupt can claim exemptions of property which he had theretofore transferred to a certain creditor or creditors with intent to prefer, and which property thereafter comes into the estate, is one on which there is a marked conflict of opinion in the reported cases. The cases are referred to in the brief filed by the trustee.

My conclusion on this point is that the conveyance to Willard O. Wayman was in trust for the creditors, which trust was never executed, being avoided by the bankruptcy proceeding, and that the bankrupt is entitled to his claim of exemption against the property.

For the foregoing reasons I find that the bankrupt is entitled to an exemption in the real property described in his schedules as a homestead, to the extent of \$5,000. The property is subject to a mortgage, and has been appraised at \$25,000, which exceeds the amount of the homestead exemption and mortgage. The trustee has, however, been unable to find a purchaser in an amount which [13] he is willing to accept, and the sale of the property is still pending before the referee.

Respectfully submitted,

ARMAND B. KREFT,

Referee in Bankruptcy.

San Francisco, February 11th, 1914.

The foregoing order is affirmed.

[Endorsed]: Filed Feb. 18, 1914, at 11 o'clock and 30 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [14]

**[Exhibit "C" to Petition for Revision.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 7th day of May, in the year of our Lord one thousand, nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

**[Order Affirming Order of Referee Allowing Bankrupt's Claim to Homestead Exemption.]**

No. 7659.

In the Matter of F. S. MAYHEW,

In Bankruptcy.



The Court this day ordered that the Order of the Referee allowing Bankrupt's Claim to a certain Homestead Exemption, signed by said Referee, Armand B. Kreft, on January 29th, 1914, be and the same is hereby affirmed. [15]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing fifteen (15) typewritten pages, numbered from 1 to 15, inclusive, contain full, true and correct copies of "Petition by Trustee to Review Order Allowing Claim of Bankrupt to Homestead Exemption"; "Certificate of Referee on Petition to Review"; Minute Order—District Court—Affirming Order of Referee; and "Praecipe" for record on Petition for Revision, as the same now appear on file and of record in this office, in the Matter of F. S. Mayhew, in Bankruptcy, No. 7659.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of \$7.10 and that the said sum has been paid to me by R. H. Cross, Esq., attorney for appellant.

IN WITNESS WHEREOF I have hereunto set

my hand and the Seal of said District Court this 11th day of May, A. D. 1914.

[Seal]

W. B. MALING,  
Clerk.

By Lyle S. Morris,  
Deputy Clerk.

CMT. [16]

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[Endorsed]: No. 2421. United States Circuit Court of Appeals for the Ninth Circuit. Arthur H. Brandt, as Trustee of the Estate of F. S. Mayhew, Bankrupt, Petitioner, vs. F. S. Mayhew and Mrs. F. S. Mayhew, Husband and Wife, Respondents. In the Matter of F. S. Mayhew, in Bankruptcy. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Northern District of California, First Division.

Received and filed May 11, 1914.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

**[Notice of Filing of Petition for Review.]**

*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

No. 7659.

In the Matter of F. S. MAYHEW,

Bankrupt.

To Hartley F. Peart, Esq., Attorney for Mrs. F. S.  
Mayhew, and to Ernest K. Little, Esq., Attorney  
for F. S. Mayhew, Bankrupt:

You and each of you are hereby notified that on the 11th day of May, 1914, at 10:30 o'clock A. M., I will present and file in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, State of California, the annexed petition of Arthur H. Brandt, as trustee of the estate of F. S. Mayhew, bankrupt, for review by the above-named court of a certain order of the District Court of the United States, for the Northern District of California, First Division, which said order was filed in the office of the clerk of said court on the 7th day of May, 1914, confirming the order of Armand B. Kreft, Referee, dated February 2d, 1914, by which said order the claim of said F. S. Mayhew, said bankrupt, to a homestead exemption to certain real property situated in the County of San Mateo, California, in the value of \$5,000 was granted and allowed.

Dated: May 11, 1914.

R. H. CROSS,  
Attorney for Trustee.



Service of the within notice is hereby admitted  
this 11th day of May, 1914.

NOWLIN, FASSETT & LITTLE,  
Attorneys for Bankrupt.  
HARTLEY F. PEART,  
Of Counsel for Bankrupt.

[Endorsed]: No. 2421. United States Circuit  
Court of Appeals, Ninth District. In the Mat-  
ter of F. S. Mayhew, Bankrupt. Notice of In-  
tention to File Petition for Revision. Filed May 11,  
1914. F. D. Monckton, Clerk.

No. 2421

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR H. BRANDT, as trustee of F. S.  
MAYHEW, in bankruptcy,

*Petitioner,*

vs.

F. S. MAYHEW and MRS. F. S. MAYHEW,  
husband and wife,

*Respondents.*

In the Matter of F. S. MAYHEW,  
In Bankruptcy.

## PETITIONER'S OPENING BRIEF ON PETITION FOR REVISION.

R. H. CROSS,  
*Attorney for Petitioner.*

Filed the day of May, 1914.

**FILED**

MAY 19 1914

FRANK D. MONCKTON, Clerk.

By \_\_\_\_\_ Deputy Clerk.





No. 2421

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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ARTHUR H. BRANDT, as trustee of F. S.  
MAYHEW, in bankruptcy,

*Petitioner,*

VS.

F. S. MAYHEW and MRS. F. S. MAYHEW,  
husband and wife,

*Respondents.*

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In the Matter of F. S. MAYHEW,  
In Bankruptcy.

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## PETITIONER'S OPENING BRIEF ON PETITION FOR REVISION.

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### Statement of the Case.

There is no controversy concerning the facts in this case. Briefly enumerated they are, in their chronological order, as follows:

On the 18th day of April, 1912, F. S. Mayhew, and his wife, transferred and conveyed to one Wil-

lard O. Wayman, certain real property situated in the County of San Mateo, State of California, upon which they had been living. This conveyance was by deed and was a part of a general assignment of his assets for the benefit of his creditors. On August 17th, 1912, a petition in involuntary bankruptcy against F. S. Mayhew was filed in the District Court, the act of bankruptcy charged by the petitioning creditors, being the conveyance to Willard O. Wayman above described. On October 8th Mayhew was duly adjudicated a bankrupt by the District Court, and the administration of his estate referred to Armand B. Kreft, referee, at San Francisco.

On November 4th, 1912, Mrs. Mayhew, the wife of the bankrupt, recorded with the county recorder of San Mateo County, State of California, a declaration of homestead upon the real property which she jointly with her husband had on April 18th, transferred to Willard O. Wayman. On November 20th, 1912, Mrs. Mayhew filed a petition with the referee for an order setting apart as exempt the dwelling house and land upon which she had filed the declaration of homestead.

On December 13th, 1912, the first meeting of creditors was held and Arthur H. Brandt duly elected trustee. On December 20th, 1912, Willard O. Wayman transferred and surrendered to the trustee the property conveyed to him by the Mayhews.

On January 10th, 1913, the trustee filed with the referee an inventory of the property and assets of the estate of the bankrupt which had come into his possession. This inventory included as an asset of the bankrupt the real property situated in the County of San Mateo, heretofore referred to. On February 17th, 1913, the bankrupt made his appearance and filed his schedules of his creditors and of his property. In these schedules under the heading provided for that purpose, he made claim to an exemption of \$5000.00 in value of the San Mateo real estate upon which his wife had filed the declaration of homestead.

The trustee refused to set aside the homestead claiming that the bankrupt was not entitled thereto. On February 2nd, 1914, the referee made an order granting and allowing the claim to the exemption, and ordering and directing the trustee to set aside a homestead to the bankrupt to the value of \$5000.00 and to pay and deliver said sum to said bankrupt out of and from the proceeds of the sale of the real property when the sale should be made, a sale at that time being pending. On February 15th, 1914, the trustee filed his petition for the review of the referee's order. On February 11th, 1914, the referee certified the questions involved to the District Court. On May 7th, 1914, the District Court affirmed the order of



the referee granting and allowing the homestead exemption as claimed by the bankrupt. It is from this order of the District Court affirming the order of the referee that this petition for revision is taken.

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### Questions Presented.

Upon the uncontradicted facts enumerated above, two clean cut questions of law are presented:

1. Is a bankrupt in the State of California entitled to claim a real estate homestead exemption where neither he nor any one in his behalf has made and recorded a declaration of homestead as required by the state statutes, prior to his adjudication in bankruptcy?

2. Assuming that he would otherwise be so entitled, is he precluded from making such a claim by a voluntary conveyance of the real property for the benefit of creditors made prior to the petition and adjudication in bankruptcy, the property being subsequently recovered by the trustee?

Both of these questions are of considerable importance in the administration of the bankruptcy law in the State of California, not only to the creditors in the pending case but to creditors generally. It is submitted that the first question must be answered in the negative and the second in the affirmative.

## Argument.

### I.

**A BANKRUPT IN THE STATE OF CALIFORNIA IS NOT ENTITLED TO CLAIM A REAL ESTATE HOMESTEAD EXEMPTION WHERE NO DECLARATION OF HOMESTEAD HAS BEEN MADE AND RECORDED AS REQUIRED BY THE STATE LAWS, PRIOR TO HIS ADJUDICATION.**

This general proposition divides itself for convenience in discussion, into two specific propositions, viz.:

A. That a bankrupt under such circumstances is not entitled to claim the exemption irrespective of any consideration of the bearing and effect of Section 47A (2) of the Bankruptcy Act as amended in 1910.

B. That if he were otherwise entitled to claim such an exemption he is precluded from so doing by the provisions of the amendment.

We will consider these two specific propositions separately and in the order stated.

### A.

**NO STATUTORY DECLARATION OF HOMESTEAD HAVING BEEN FILED PRIOR TO ADJUDICATION, A BANKRUPT IN THE STATE OF CALIFORNIA IS NOT ENTITLED TO CLAIM AN EXEMPTION, AND THIS IRRESPECTIVE OF THE BEARING AND EFFECT OF SECTION 47A (2) OF THE NATIONAL BANKRUPTCY ACT.**

There are just two statutes or sets of statutes of the State of California under which a bankrupt can claim a real estate homestead exemption. These

are (1) The general homestead law set out as Title V, Part IV of the Civil Code; and (2) Paragraph 64 of Article 10 of the Insolvent Act of 1895.

The general homestead law of the state as contained in Title V, Part IV of the Civil Code defines homesteads, the way they may be secured, and the extent of the exemption allowed. Section 1237 of Chapter I of this title provides that the homestead shall consist of the dwelling house in which the claimant resides and the land on which the same is situated, selected as provided in this title. Section 1238 provides that in case the claimant is married, the homestead may be selected from the community property or the separate property of the husband, or, with the consent of the wife, from her separate property. Sections 1240 and 1241 provide that the homestead is exempt from execution or forced sale

“except in satisfaction of judgments obtained (1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises; (2) On debts secured by mechanics’ materialmen’s or vendors’ liens upon the premises; (3) On debts secured by mortgages on the premises executed and acknowledged by husband and wife; and (4) On debts secured by mortgages executed and recorded before the declaration of homestead was filed for record.”

Section 1242 provides that a homestead cannot be conveyed or encumbered unless the instrument is executed and acknowledged by both husband and



wife. Sections 1243 and 1244 state the circumstances and method by which a homestead may be abandoned. Sections 1245 to 1259 inclusive, set out the proceedings by which the excess in value of the property over the homestead claimed may be reached by creditors. Section 1260 provides that homesteads may be selected and claimed of not exceeding \$5000.00 in value by the head of a family, or of not exceeding \$1000.00 in value by any other person. Section 1261 defines the head of a family as “(1) the husband when the claimant is a married person, \* \* \*”. Sections 1262, 1263, 1264 and 1265, respectively, provide as follows:

“1262. In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

1263. The declaration of homestead must contain:

1. A statement, showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

1264. The declaration must be recorded in the office of the recorder of the county in which the land is situated.

1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. \* \* \*

Space does not permit setting out all the provisions of the general homestead law of the state. From the sections quoted, however, it is at once apparent that the recording of a formal declaration of homestead with the county recorder is a condition precedent to the right to claim a homestead exemption. No such right exists unless the provisions of the statutes have been complied with.

By Section 70A of the Bankruptcy Act, the trustee of the estate of a bankrupt,

“upon his appointment and qualification \* \* \* shall \* \* \* be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all \* \* \* (5) property which prior to the filing of the petition he by any means could have transferred or which might have been levied upon and sold under judicial process against him.”

As no declaration of homestead had been filed pursuant to the state laws, prior to the date of adjudication, it would seem to follow logically that at that date, pursuant to the provisions of this section, title vested in the trustee. The title having passed to the trustee as of that date, a subsequent attempt to perfect the homestead under the state laws would be nugatory.

There is no occasion for an elaborate argument on this proposition, since the United States Circuit Court of Appeals for the Eighth Circuit has, in a well considered opinion, carefully and exhaustively reviewed it. In the case of *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 98, that court held that where a bankrupt had failed to cause the word "homestead" to be entered in the margin of the record title to his property, as provided by the Colorado laws, before adjudication, he could not claim his exemption. After an extensive consideration of the questions involved, the court said:

"We conclude that a claimed exemption otherwise recognized by the State law, but to which the bankrupt had not become entitled at the time of the filing of the petition, or at the time he was adjudicated a bankrupt, is not within the saving and protecting clause of the Bankruptcy Act, and cannot be allowed or set apart therein."

There are one or two decisions by the District Courts which seem to hold that a bankrupt may, even after adjudication, perfect his homestead under the state law. (*In re Fisher*, 142 Fed. 205; *In re Culwell*, 165 Fed. 165.) The reasoning of these cases, however, is unsatisfactory, and must give way to the more logical view and the greater weight of the decision in the case of *In re Youngstrom*. It follows, therefore, that so far as the bankrupt's claim to exemption was based upon the provisions of the general homestead law of California,



he was precluded by his failure to perfect his right under the state law prior to his adjudication.

Paragraph 64 of Article 10 of the Insolvent Act of the State of California of 1895 contains the following provision:

“It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent, such real and personal property as is, by law, exempt from execution; *and also a homestead, in the manner provided in Section 1465, of the Code of Civil Procedure.*”

Section 1465 of the Code of Civil Procedure referred to in this provision of the Insolvent Act pertains to probate proceedings, and is as follows:

“Upon the return of the inventory, or at any subsequent time during the administration, the court may on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded; provided such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate and set apart, the cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children; in the manner provided

in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.”

It will be noticed that by the provisions of the Insolvent Act and of Section 1465, Code of Civil Procedure, it is not necessary that a formal declaration of homestead be made and recorded as provided in the general homestead law of the state. The homestead under these sections is in the nature of a “probate” homestead and may be set aside even though none had therefore been selected. The Insolvent Act, therefore in terms, adds to the general exemption laws on execution, a homestead exemption, if it can properly be designated an “exemption”, that is peculiar to that Act.

Section 6 of the Bankruptcy Act provides as follows:

A. “This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have their domicile, for the six months or the greater portion thereof immediately preceding the filing of the petition.”

Was the bankrupt entitled to claim a homestead exemption under the provisions of the Insolvent Act? The answer to this question involves a consideration of what is meant by (1) The term “exemptions” as used in Section 6 of the Bankruptcy Act, quoted *supra*; and (2) the words “in force” as used therein.

It is submitted that the word "exemptions" as employed in Section 6 is restricted to exemptions "from judicial process on execution", and does not apply to exemptions that are peculiar to the state insolvency laws. The authorities are very few in which Section 6 has been construed or interpreted with reference to this question. This undoubtedly is due to the fact that ordinarily the exemptions provided for under the general laws of the state are the exemptions provided for in the state insolvency laws. The expressions of the courts, however, would seem to indicate that they consider the word as applicable to "exemption from execution". Thus, in *Richardson v. Woodward*, 104 Fed. 874, it was said:

"The intention was to adopt the State laws governing exemptions. Hence, the courts of bankruptcy will look to be governed by the constitutions, statutes and decisions of the several states and territories, in deciding who is entitled to exemptions and the amount and species of property to be exempt. *A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the State law, and none other.*"

See also:

In re Wunder, 133 Fed. 822;

Loveland on Bankruptcy, Sec. 415, 11th Ed.

This view is strengthened by a consideration of the provisions of the Bankruptcy Act of 1867. Section 14 of that Act contained a specific enumeration of the property to which the bankrupt was entitled



as exempt, specifying particularly household and kitchen furniture, wearing apparel and the uniform, arms and equipments of persons who had been in the military service of the United States. It then provides as follows:

“and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such exemption laws in force in the year eighteen hundred and sixty four”.

At the time the Bankruptcy Act of 1898 was passed, Congress had before it the decisions of the courts construing the Act of 1867. These decisions were uniformly to the effect that the Bankruptcy Act of 1867 had *ipso facto* suspended all state legislation upon the subject of bankruptcy and insolvency. (Loveland on Bankruptcy, 3rd Ed., Sec. 12, page 27.) When, therefore, in the Act of 1898, Congress provides for the allowance to bankrupts “of the exemptions which are prescribed by the state laws in force” it must be taken that its only purpose was to state in a general way what was stated specifically in the Act of 1867, and that by its very use of the words “in force” it excluded exemptions peculiar to the state insolvency laws. As a matter of fact Congress virtually defines the term as used in Section 6, by Section 67, subdivision E,

where in referring to fraudulent transfers it is provided that

“all property of the debtor conveyed, transferred, assigned or encumbered, as aforesaid, shall, if he be adjudged as bankrupt, *and the same is not exempt from execution, and liability for debts by the law of his domicile*, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings, or otherwise, for the benefit of the creditors.”

Some of the above considerations apply with equal force to the construction of the words “in force” as used in Section 6. Not only in the Act of 1867 but also under the Act of 1898, it is well settled by the decisions, both federal and state, that the effect of a national bankruptcy law is to suspend the operation of any state bankruptcy or insolvency law regulating the assignment and distribution of the property of insolvents and affecting the same persons, property and rights that would be affected by proceedings under the Bankruptcy Act. (Loveland on Bankruptcy, 3rd Ed., page 23, Sec. 12.)

“The authorities were in some conflict at one time as to the extent of the suspension of the operation of the State Insolvency Laws, but the great weight of the decisions now is that after the passage of the Bankruptcy Act the Insolvency Laws are in complete abeyance.”

5 Cyc., page 241, Note 17.

Since, therefore, the State Insolvent Act of 1895 was completely suspended by the Bankruptcy Act of 1898, and since the bankrupt could only claim that homestead exemption in insolvency proceedings in the state court, it would seem to follow logically that the exemption is not one prescribed by a state law "in force".

If, however, it be assumed for the purpose of argument that the State Insolvent Act is not in complete abeyance by reason of the enactment of the national bankruptcy law it must nevertheless be conceded that, at all events, it is suspended as to all parts in conflict with the national law. Consequently, even were it assumed that the right accorded by the provisions of the Insolvent Act is an "exemption", as that term is used in Section 6 of the Bankruptcy Act, yet if that section is in conflict with the provisions of that Act it is not "in force". A brief consideration of the administrative features and the scheme of title provided for in the Insolvent Act will suffice to show that they are inconsistent with the theory and provisions of the Bankruptcy Act.

Section 1465 A of the Code of Civil Procedure provides that on the filing of a petition for the setting apart of the homestead provided for in Section 1465, which latter section is referred to by the Insolvent Act, the court

"must set the petition for hearing and give notice thereof by causing notices to be posted in at least three public places in the county,



one of which must be at the place where the court is held, containing the name of the decedent, the name of the petitioner, the nature of the application, and the time at which the same will be heard."

The same section further provides that:

"Such notices must be given at least ten days before the hearing, and a copy thereof must be mailed at least ten days before the day appointed for the hearing to the executor or administrator, if he be not the petitioner, and to any person named as co-executor or co-administrator, not petitioning, addressed to them at their places of residence, if known, and if not known, then to the county seat of the county where the proceedings are pending. Proof of such posting and mailing must be made at the hearing."

There is no provision in the Bankruptcy Act for the adoption of the administrative procedure required by the state laws. It is obvious that there is no place in bankruptcy proceedings for the notices provided in the sections just cited. Since the right under the Insolvent Act could only be perfected by following the statutory requirements, and since that procedure is not adopted by the Bankruptcy Act, it follows that there is no way in which the right can be perfected in the bankruptcy courts.

In the second place, it will be noticed that Section 1465, Code of Civil Procedure, provides that "*the court* must select, designate and set apart and cause to be recorded, a homestead". Under this provision it is obvious that the claimant acquires no absolute

right, even by his petition, to any particular piece of property, if, as a matter of fact, there were more than one piece available. The designation of any particular piece rests entirely in the discretion of the court. This is totally at variance with the theory of the Bankruptcy Act, which gives no jurisdiction to the bankruptcy court over exempt property, except for the purpose of setting it aside. The choice of property as exempt is a matter that rests entirely with the bankrupt, and the bankruptcy court cannot help him to perfect it.

Further, the provision last quoted, is at total variance with the scheme of title as provided for in the Bankruptcy Act. If the bankrupt had several pieces of property suitable for a homestead where would the title be vested during the time intermediate the filing of the petition and the designation of any particular piece by the court as a homestead? The Bankruptcy Act, as already stated, provides that the title passes to the trustee as of the date of adjudication. The only possible theory, therefore, on which the provisions of Section 1465 could be said to be consistent with the vesting of title under the Bankruptcy Act, would be by the fiction that title to the piece ultimately selected never departed from the bankrupt. Any such theory, however, would give rise to a "twilight zone" concerning the vesting of property in bankruptcy that is neither contemplated nor possible under the Act. There is no place in that Act for an undetermined title. The title vests in the trustee

as of the date of adjudication by the very terms of the Act, except as to property which is then exempt. It is that date which fixes the time of determining the exemptions, and it cannot be postponed, as provided in Section 1465, until some subsequent date.

The view that an exemption provided for by the state insolvency law, solely, is not available in bankruptcy where the proceedings necessary for its perfection are at variance with the theory and provisions of the Bankruptcy Act, is well set forth by Judge Lowell of the District Court of Massachusetts in the case of *In re Anderson*, 110 Fed. 141. In that case the bankrupt had made claim to an exemption provided for by the insolvency law of Massachusetts. (Pub. St. Mass. C. 171, Sec. 34.) Chapter 157, Section 99 of that law provided that the debtor should receive from the assignee \$1.00 a day for his attendance on the judge. 2. That he should also be allowed out of his estate for the support of himself and family, not exceeding the sum of \$3.00 per week for each member of his family, and not exceeding two months, and 3. "five per cent of the net produce of all his estate received by the assignee if such net produce after such allowance was sufficient to pay the creditors entitled to a dividend the amount of 50 per cent on their debts but the allowance not to exceed in the whole \$500.00".

Judge Lowell held that it was impossible in view of the provisions of the Bankruptcy Act to allow such an exemption. He stated his reasons as follows:



“The bankrupt seeks to obtain the allowance given by the second sentence of the section above quoted. To do this, he must establish that the allowance to be made is one ‘of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition’. Bankr. Act, Sec. 6. Precisely what meaning should be given to the word ‘exemption’ is difficult to determine in a case like this. *Hitherto the only exemptions allowed in this district have been those established by Pub. St. Mass. C. 171, Sec. 34, concerning goods exempt from execution*, which exemptions are dealt with by the Massachusetts insolvency act in section 46. Upon the whole, though with considerable doubt, I think that the allowances made by section 99 are not properly exemptions, within the purview of section 6 of the bankrupt act but are concerned with that part of the insolvency law *which is suspended in its operation by the passage of the bankrupt act*. We can hardly suppose that the debtor is entitled to receive from the trustee one dollar per day for his attendance, as provided in the first sentence of section 99, or that he is to be allowed 5 per cent on the net produce of his estate, if that estate pays a 50 per cent dividend to his creditors, as provided in the last sentence of the same section. The provision here in question which comes between the two just mentioned, may seem less objectionable, but one can hardly be enforced under the bankrupt act while the others are refused enforcement. *Moreover, it is to be observed that the allowance provided is at the discretion of the judge of probate, and it is doubtful if the bankrupt act was intended to substitute in any respect the discretion of the judge of the district court for that of the judge of probate*. True, if the allowance is denied, the bankrupt will get less from his own estate than if the bankrupt act had not

been enacted, and the insolvency law was still in force. *This result seems opposed to the general intent of section 6 of the bankrupt act, but in this case the result seems unavoidable.* The judgment of the referee is reversed, and the allowance to the bankrupt is denied."

In conclusion on this branch of the case, it is contended in view of the above authorities and considerations that, irrespective of any consideration of the bearing or effect of Section 47A (2) as amended in 1910, the bankrupt was not entitled to the homestead exemption claimed in his schedules. He was not entitled to make such claim under the provisions of the general homestead law of California because he had failed to perfect his claim under such state laws prior to adjudication. He could not claim the exemption under the Insolvent Act of 1895, for the reason that its provisions were neither in force nor such as are contemplated by the Bankruptcy Act. The order of the District Court was, therefore, for this reason, if for no other, erroneous.

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## B.

ASSUMING THAT THE BANKRUPT WOULD OTHERWISE BE ENTITLED TO THE HOMESTEAD RIGHT ACCORDED BY PARAGRAPH 64 OF THE INSOLVENT ACT OF 1895 HE IS PRECLUDED FROM MAKING SUCH CLAIM BY REASON OF THE OPERATION AND EFFECT OF SECTION 47A (2) OF THE BANKRUPTCY ACT AS AMENDED IN 1910.

Assuming for the purpose of argument that the right accorded under Section 64 of the Insolvent

Act is an "exemption" and a state law "in force", within the meaning of those words as used in Section 6, nevertheless it is contended that by reason of the effect of the provision of Section 47 A (2) of the Bankruptcy Act as amended in 1910, he was precluded from claiming it.

The direct provisions of the Insolvent Act as well as the decisions of the Supreme Court of the State of California, are to the effect that the homestead set apart under and pursuant to the provisions of the Insolvent Act are subject to all valid and legal liens existing on the property out of which the homestead is created. The 36th section of the Act provides that the property of the insolvent is to be surrendered to his creditors but makes the following proviso:

"All legal mortgages and liens bona fide existing on such property at the time of the surrender as aforesaid, shall remain good and valid and may be enforced in the same manner as though no such surrender had been made."

In the case of *Bowman v. Martin*, 16 Cal. 215, the Supreme Court of the state held that under this provision a decree in insolvency designating and setting apart to an insolvent certain premises as a homestead, did not discharge or impair any lien that theretofore existed on the premises.

The same holding has been made with reference to liens existing on property set aside as probate



homesteads under the provisions of 1465 of the Code of Civil Procedure referred to in Section 64 of the Insolvent Act.

Estate of Orr, 29 Cal. 102;

Estate of MacAulay, 50 Cal. 544;

Schedt v. Heppe, 45 Cal. 437.

If it be assumed that the bankrupt was entitled to a homestead exemption under the general homestead laws, even in that case the homestead would, pursuant to Subdivision 1 of Section 1241, of the Code of Civil Procedure, quoted *supra*, be subject to any liens that existed on the premises.

In 1910 Congress amended Section 47 A (2) of the Bankruptcy Act. It now reads as follows, the portions added in 1910 being italicized:

“Trustees shall respectively \* \* \* (2) Collect and reduce to money the properties of the estates for which they are trustees under the direction of the court and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustee as to all property in the custody or coming into the custody of the bankruptcy courts shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*”

The amended portion of the section by its direct terms, puts the trustee as to all property in the cus-

tody or coming into the custody of the bankruptcy court, in the position of a creditor holding a lien by legal or equitable proceedings and as to all other property in the position of a creditor holding an execution returned unsatisfied. It would seem to follow therefore, logically, by the very terms of the amendment, that the trustee in the case at bar was in a position of a lien creditor as to the real property claimed by the bankrupt as a homestead. Since the trustee represents all the creditors of the estate his lien would extend to the entire indebtedness against the bankrupt. The result necessarily is that the bankrupt as against such a lien, cannot claim the exemption.

The referee took the position that the section should not be given such a construction since to do so would make it conflict with the provisions of Section 6 of the Bankruptcy Act. This position we assume, by reason of its affirmance of the order of the referee, was considered by the District Court as the proper one. The obvious answer to this position is, as we have heretofore pointed out, that the right accorded by the Insolvent Act is neither an "exemption" nor "in force". Assuming the contrary, however, an assumption which we have made for the purpose of discussing this question, we fail to see how the mere fact that the operation of Section 47 A (2) conflicts with the provisions of Section 6, justifies the court in refusing to give effect to the direct and unequivocal words of the

section, or in adding a modification or exception thereto.

The words of the amendment are clear and unambiguous. It states as to "all" property, etc., the trustee shall be deemed vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. There is no exception made either as to exempt property or any other property that might come into the custody of the bankruptcy court. As the provisions of the statute stand they are as applicable to exempt property as to other property administered in bankruptcy proceedings.

It is a cardinal rule of statutory construction that when the terms of a statute are plain and certain, nothing is left for construction or interpretation and that the statute will be enforced in all cases which clearly fall within its terms.

"It is an elementary proposition that courts only determine by construction the scope and intent of a law when the law is ambiguous or doubtful. If a law is plain and within the legislative power, it declares itself, and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh, would make the judicial superior to the legislative branch of the government, and practically invest it with a law-making power. The remedy for a harsh law is not in interpretation, but in amendment or repeal."

State v. Duggan, 15 R. I. 403, Atl. 787.



“In conformity with this general rule of statutory construction, the courts have held that no exceptions will be engrafted upon the plain words of a statute merely because, in the opinion of the court, such exceptions ought to be made or because such exceptions would be just and reasonable or wise and politic.”

*Barker v. Hebbard*, 81 Mich. 267, 45 N. W. 964.

*Davenport v. Hannibal*, 120 Mo. 150, 25 S. W. 364;

*Randall v. Richmond etc. Co.*, 104 N. C. 410, 10 S. W. 691;

*Gilvert v. Dutruit*, 91 Wis. 661, 65 N. W. 511;

*U. S. v. Transmissouri Freight Association*, 166 U. S. 290, 41 L. Ed. 1007;

*Sturgess v. Crowninshield*, 4 Wheaton 122, 4 L. Ed. 529.

Sutherland on “Statutory Construction” (Vol. II, page 701), thus sums up the rule:

“Cases cannot be included or excluded merely because there is intrinsically no reason against it. Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. Courts have, then, no powers to set it aside or evade its operation by forced or unreasonable construction. If it has been passed improvidently, the responsibility is with the legislature and not with the courts.”

As suggested in the last quotation, if Congress did not intend that the amendment should affect exemptions in any way, the remedy lies not in the courts but with Congress. It is to be further borne in mind with reference to the immediate question that the amendment of 1910 to Section 47A was enacted subsequent to Section 6 of the Act, and therefore is controlling.

The result of thus giving full application to the provisions of the amendment is by no means as startling as at first glance it might seem. As heretofore stated, the exemption laws provided for in State Insolvency Acts are ordinarily the exemptions provided for in the general laws of the state. Since these general exemption laws refer uniformly to exemptions "on execution" it is obvious that they are in no wise affected by a provision that vests the trustee only with the powers of an execution creditor. The only possible cases in which the section could have any effect upon exemptions would be those isolated cases, of the nature of the case at bar, in which an exemption in addition to those prescribed by the general laws of the state, is added by the Insolvent Act, and possibly one case arising under the general laws relating to exemption on execution. Under the general laws of some of the states, property which would otherwise be exempt is held subject to execution on a judgment for the purchase price of such property. So far, therefore, as the amendment might be construed as putting the

trustee, as to all the claims against the bankrupt, in the position of a creditor holding "a judgment for the purchase price", it would necessarily affect his exemption rights. These are the only two cases that occur to us in which the amendment could possibly affect such exemptions. To read an implied exception into the Acts because of its possible bearing on these isolated cases is to ascribe to Congress an intention that in all probability never existed.

In the argument before the referee and the District Court, it was sought to confine the operation of the amendment to property other than exempt property, by adverting to the immediate purpose of Congress in passing the Act. It may be conceded that the immediate occasion for the passing of the amendment was the decision of the Supreme Court of the United States in the case of *York Manufacturing Company v. Cassel*, 201 U. S. 344. In that case it was held that the trustee was only in the position of the bankrupt, and accordingly that a lien evidenced by an unrecorded instrument was valid as against the trustee. This result was undoubtedly changed by the amendment in question, but it by no means follows that the amendment is to be limited in its operation solely to the case that occasioned its passage.

The federal courts since the passage of the amendment, when called upon to construe its operation and effect, have applied it without question to the various situations in which, by its direct terms, it was applicable. Thus it has been held that by



reason of its provisions, a trustee now has the power to maintain an action in trespass and recover damages arising from unlawful conspiracy entered into by the bankrupt and others prior to adjudication, to transfer and conceal moneys of the bankrupt, on the ground that such a right was possessed by an execution creditor (*Sattler v. Sloninsky*, 28 A. B. R. 729); that a trustee can sell the property of a bankrupt so as to divest the wife of the bankrupt of her dower interest, such right being accorded to execution creditors under the law of the state (*In re Cordori*, 30 A. B. R. 455, 207 Fed. 784); that under the terms of the amendment it is immaterial whether there are any "subsequent creditors" where by the state law an unrecorded conditional contract of sale is "void as to subsequent creditors", since the trustee is in the position of the most favored creditor under the local law (*Farmers Co-operative Co. v. Barlow*, 30 A. B. R. 190), and that by reason of the amendment the trustee is not only in the position of a judgment creditor holding a lien, but is in the position of a bona fide holder, and that consequently, a creditor cannot rescind as to him a fraudulent sale procured by the bankrupt, and cannot follow the goods in his hands (*In re Whatley Bros.*, 29 A. B. R. 64).

These decisions would seem to indicate that in the opinion of the court the operation of the amendment is not to be confined solely to the situation which occasioned its passage. But more than this,

there are at least three cases in which the application of the amendment has affected the bankrupt's exemptions. These are the cases of *In re Stern*, 30 A. B. R. 694, 208 Fed. 488; *In re Phillips*, 31 A. B. R. 597, 209 Fed. 490, and *In re Morris*, 30 A. B. R. 319. In the two cases of *In re Stern* and *In re Phillips*, *supra*, the District Court for the Western Division of Ohio, and the District Court for the Western District of Washington, respectively, held that by reason of the status given to the trustee by the amendment, he was in the position not only of a creditor possessing a lien on property in the custody of the bankrupt, but that he was in the position of an execution creditor holding a judgment rendered for the purchase price thereof. In the former case the court limited the extent of the trustee's lien to the aggregate amount of the claims of those creditors who had sold the personal property. In the latter case, however, the lien was extended to the full amount of the bankrupt's indebtedness without distinction as to the nature of the claims of the various creditors. *In neither case did it appear that any of the creditors had procured a judgment for the purchase price of any of the property.* These decisions, therefore, are absolutely inconsistent with any theory that would confine and limit the effect of the amendment to property other than exempt property.

In the case of *In re Morris*, cited *supra*, the Circuit Court of Appeals for the Second Circuit held that by reason of the amendment the trustee

now has the right to maintain an action to recover the surplus income to which a bankrupt is entitled under a will. It had been held by the Court of Appeals of New York in the case of *Butler v. Boudaine*, 69 N. E. 1121, affirming a judgment of the Supreme Court of the state (82 N. Y. S. 773) that such surplus could only be reached on equitable proceedings by a creditor holding an execution returned unsatisfied. So far as it could not be reached by the ordinary creditors, therefore, it was an exemption that arose by reason of the laws of the state. Consequently the decision of the Circuit Court of Appeals is consistent only with the theory that in its opinion the direct provisions of 47A were to be given effect, notwithstanding the fact that it thereby affected a state exemption.

It is submitted, therefore, that the provisions of the amendment should not be restricted solely to the case that occasioned its passage, but that it must be given the full effect that its express provisions require, and this regardless of the fact that it may in one or two isolated instances affect the bankrupt's exemption. Accordingly, we conclude even on the assumption that the right accorded by Section 64 of the Insolvent Act is an "exemption in force", that the trustee was, by virtue of the provisions of the amendment, vested with a lien that was paramount to the bankrupt's claim of homestead exemption.



## II.

**THE BANKRUPT AND HIS WIFE HAVING VOLUNTARILY CONVEYED THE REAL PROPERTY IN QUESTION FOR THE BENEFIT OF THEIR CREDITORS PRIOR TO THE PETITION AND ADJUDICATION, HAVE THEREBY, IN ANY EVENT, PRECLUDED A CLAIM FOR HOMESTEAD EXEMPTION.**

As heretofore stated, the bankrupt and his wife on the 18th day of April, 1912, conveyed the property out of which they subsequently claimed a homestead to one Willard O. Wayman for the benefit of the creditors of the bankrupt. This transfer was the act of bankruptcy charged by the petitioning creditors and upon which the adjudication was obtained. On the 20th day of December, 1912, after the appointment of the trustee, Willard O. Wayman transferred and surrendered the property so conveyed to him to the trustee.

It is contended by the trustee that by reason of this voluntary conveyance, the bankrupt is precluded from claiming a homestead exemption in bankruptcy. It must be conceded that while the question here presented has arisen frequently in the federal courts, there is by no means an unanimity of opinion concerning it. Some of the courts have held that where property has been transferred as a preference or for the benefit of creditors, and subsequently recovered or surrendered to the trustee, the bankrupt has lost his right to claim a homestead exemption. On the other hand, other cases have held that the bankrupt is not under such circumstances precluded from mak-

ing his claim. The following cases hold that no claim of exemption can be made:

In re Coddington, 126 Fed. 891; 11 A. B. R. 122;

In re Evans, 116 Fed. 909; 8 A. B. R. 730;

In re Long, 8 A. B. R. 591; 116 Fed. 113;

In re White, 109 Fed. 635; 6 A. B. R. 451;

In re Tollette, 105 Fed. 425; 5 A. B. R. 505;

In re Neal, 14 A. B. R. 550;

In re Sharr, 15 A. B. R. 491;

In re Washnifsky, 181 Fed. 896;

In re Staunton, 117 Fed. 507.

The following cases hold contra:

In re Falconer, 110 Fed. 111; 6 A. B. R. 557;

Bashinka v. Talbott, 119 Fed. 337;

In re Talbott, 116 Fed. 417; 8 A. B. R. 427;

In re Thompson, 140 Fed. 257;

In re Seaper, 173 Fed. 116.

These cases and the arguments advanced pro and con are considered by Remington in his work on Bankruptcy in Vol. I, pages 616 to 623.

The cases of In re Coddington and In re Falconer, *supra*, may be taken as the leading and most authoritative cases, respectively, for these two diverse positions. In the case of In re Coddington, Judge Archibald of the District Court of the Middle District of Pennsylvania, reviewed all the authorities on the question and in view of the diversity of opinion considered the question on principle as one of first impression. After

deciding that the matter was to be considered not from the standpoint of local law, which varies from state to state, but by reference to the provisions of the Bankrupt Act itself, he said:

“So far as the bankrupt himself is concerned a preferential transfer is absolute and cannot be recovered back. He parts with his money or property for the benefit of the creditor to whom it is turned over, who is entitled to retain it except as the transaction is made voidable by the Bankrupt Act at the instance of the trustee or a surrender is required before participation can be had by the creditor in the rest of the estate. Manifestly, the provisions which lay ground for a recovery in either of these ways are not intended for the benefit of the bankrupt, but his general creditors, in order to secure an equal division among all. When, therefore, the trustee proceeds to reclaim, by suit or otherwise, the property which has been disposed of, he does it in the interest of creditors whom he represents, and not of the bankrupt whom—except remotely and contingently—he does not and whose act, in fact, he is seeking to undo. In view of this, it would produce a most peculiar and anomalous result if at this stage, the bankrupt could step in and assert his exemption to that which had been recovered, and thus defeat the very object for which a right of recovery is given by the act. *It is to be remembered, also, that property which the bankrupt is entitled to exempt forms no part of the estate passing to the trustee, nor does the trustee take title thereto* (Lockwood vs. Exchange Bank, 190 U. S. 294, 10 Am. B. R. 107). *Consistent with this, the bankrupt must, therefore, be the owner of the property at the time he demands his exemption out of it, and cannot extend his claim over that*



*to which he has no title, except through the intervention and instrumentality of the trustee.* It absolutely reverses the order, if after the trustee has successfully asserted title to the property in the hands of the preferred creditor, the bankrupt, whose rights in it were gone, can reassert them, divesting the title of the trustee and reclaiming the property to himself. \* \* \* What he seeks to do here is to obtain the benefit of that which the creditor has surrendered (finding himself unable to retain it), to the detriment of that creditor as well as all others, the property given up being practically the whole of the estate. If this can be successfully done, a debtor who has given a preference but repents of it, can go into bankruptcy and get it back, a result hardly to be contemplated.

It is said, however, that there is a distinction to be drawn between a preference which is only recovered at the end of litigation and with expense to the estate, and one which, as here, is voluntarily surrendered at the outstart and thus passes into the hands of the trustee at once, along with the rest of the estate. But so far as the bankrupt is concerned a preference is a preference, under whatever circumstances it is given, or whatever be the outcome with regard to it. It may be so manifestly voidable that the creditor concludes to surrender it without a contest, or so related to the rest of the estate as to make it desirable for him to do so, in order to come in with the other creditors. But whatever be the case, the bankrupt is not in a position to benefit by it. *In giving the preference which he did, he parted with his rights to the property, and there is nothing to bring them into being again, whether the creditor voluntarily turns it over or is compelled to do so against his will.* In the present instance it was given up to the marshal, who

went armed with an order of the court to take it, which the creditor did not deem it advisable to resist. But by whatever means secured in this or any other case, the important thing is that it is brought about by compulsion of the Bankruptcy Act, without which the transaction could not be disturbed, the purpose being to undo the act of the bankrupt for the benefit of his general creditors, from which, therefore, he can expect to derive no benefit himself."

The Circuit Court of Appeals for the Eighth Circuit, in the case of *In re Falconer*, *supra*, sets out the contrary view, in this language:

"We are of the opinion, therefore, that Hamilton did not forfeit his right to claim his exemption out of the personal property transferred to the Bank of Clarksville, although such transfer at the time it was made operated as a preference. It was not fraudulent in fact, the conveyance having been made to secure an honest indebtedness due to the bank, but was simply voidable under the provisions of the existing bankrupt law. It ought not to be held, we think, that a transfer of personal property which is affected with no other vice than that it calls within the prohibition of the bankrupt law against preferring creditors, operates as a forfeiture or waiver of the bankrupt's right to claim such exemption as the law allows out of such property or its proceeds when it has been restored to his estate and comes into the possession of his trustee. It would certainly be a harsh rule, and one that is not consonant with the humane purpose which has led to the enactment of exemption laws, to hold that if a bankrupt make a payment or transfer property by way of security to one of his creditors, and such money or property is subsequently recovered by his trustee and becomes a part of



his estate which the bankrupt court is called upon to administer, no part of the money or property so recovered can be set apart to the bankrupt to satisfy his claim for exemptions, although he may have no other property out of which the amount of his statutory exemption can be paid. The present bankrupt law does not make it a ground for refusing a discharge that the bankrupt has transferred property to one or more of his creditors which operates as a preference, and we perceive no adequate reason for holding that such a transfer of property places the same, or the proceeds thereof if it has been sold by a creditor, beyond the reach of a claim for exemptions when it is restored to his estate. No bankrupt should be deprived of his exemptions by a narrow and strict interpretation of laws which were passed for his benefit and prompted by a wise and humane public policy. The order made below, was, in our judgment, a proper order, and the petition to review the same is accordingly dismissed."

The opinion in the case just cited was not unanimous, Judge Sanborn dissenting. It is submitted that its reasoning does not meet the more logical and convincing reasoning of Judge Archibald in the case of *In re Coddington*, supra. The error of the Circuit Court of Appeals of the Eighth Circuit, we think, comes from a failure to distinguish between a fraudulent transfer and transfers which are merely voidable, such as preferential transfers and transfers for the benefit of creditors. By the direct provisions of Subdivision E of Section 67 of the Bankruptcy Act,

"all transfers, assignments or incumbrances of his property, or any part thereof, made or



given by a person adjudged a bankrupt under the provisions of this Act, subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be *null and void* as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration."

The same section further provides

"and all property of the debtor conveyed, transferred, assigned or encumbered, as aforesaid, shall, if he be adjudged a bankrupt, *and the same is not exempt from execution, and liability for debts by the law of his domicile* be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings, or otherwise, for the benefit of the creditors."

Section 70 provides as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt *except in so far as it is to property which is exempt to all*

1. Documents relating to his property;
2. Interests in patents, patent rights, copyrights and trade-marks;
3. Powers which he might have exercised for his own benefit but not those which he might have exercised for some other person;
4. *Property transferred by him in fraud of his creditors;*

5. Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.”

By the very terms of the foregoing provisions, a purely fraudulent transfer made to hinder, delay or defraud creditors, is made null and void. Consequently, such a transfer conveys no title whatsoever out of the bankrupt. Since the title, therefore, at the date of adjudication, is still in him, there is no logical reason that prevents him from claiming his exemption. Further, *the very terms* of Sections 67 and 70 reserve to him the right to claim such exemption out of such property fraudulently transferred. Thus, in the second clause of Section 67, which provides that such property may be recovered by the trustee, it is stated that such property shall remain a part of the assets of the estate if “*the same is not exempt from execution and liability for debts by the law of his domicile.*” By Subdivision 4 of Section 70 it is provided that such property fraudulently transferred, “*except in so far as it is property which is exempt*”, shall be vested in the trustee.

A preferential transfer or a transfer for the benefit of creditors is not only on principle, but by the very terms of the Act of a different character. Subdivision B of Section 60 provides that a preferential transfer shall be *voidable* at the instance of the trustee and that he may recover the property or its value from such person. Such

a transfer is not null and void as provided in the case of fraudulent transfer and such preferential transfers are not included in Section 70. Consequently they operate to pass the title, subject to the right in the trustee to avoid it. There is no direct provision in the Act with reference to the character of a conveyance for the benefit of creditors, it being referred to only as an act of bankruptcy. It is, however, of course, in its nature, analogous to the preferential transfer, and is merely voidable at the instance of the trustee (Section 1606, page 975, Remington on Bankruptcy).

It is submitted, therefore, that except in the one case of a fraudulent transfer, which by the very terms of the Act, is null and void, and does not affect the exemption of the bankrupt, a voluntary conveyance made by the bankrupt and wife prior to adjudication necessarily passes the title out of them and precludes them from subsequently claiming the exemption.

In conclusion the trustee contends that from any point of view the order of the District Court affirming the order of the referee in this case is erroneous. While we appreciate that the attitude of the federal courts is to be as liberal as possible in the granting of exemptions to bankrupts, it is not to be forgotten that the creditors have certain rights which should also be safe-guarded. As was very



aptly stated by Judge Sanborn in his dissenting opinion in the case of *In re Falconer*:

“A debtor is legally and morally bound to pay his debts; and the rule is that all his property not expressly exempt by law is subject to appropriation by his creditors to satisfy their just demands. Exemptions constitute statutory exceptions to this rule of morals and of law. They are grants of special privileges on certain conditions, and if a debtor would avail himself of them, he must comply strictly with the conditions and pursue the terms of the grant.”

It is submitted that the order of the District Court should be reversed.

Respectfully submitted,

R. H. CROSS,

*Attorney for Petitioner.*

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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ARTHUR H. BRANDT, as trustee of F. S.  
MAYHEW, in bankruptcy,

*Petitioner,*

VS.

F. S. MAYHEW and MRS. F. S. MAYHEW,  
husband and wife,

*Respondents.*

In the Matter of F. S. MAYHEW,

In Bankruptcy.

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**RESPONDENTS' BRIEF ON PETITION FOR REVISION.**

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HARTLEY F. PEART,  
ERNEST K. LITTLE,  
*Solicitors for Respondents.*

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*Filed this.....day of May, 1914.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

**FILED**





No. 2421

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR H. BRANDT, as trustee of F. S.  
MAYHEW, in bankruptcy,

*Petitioner,*

VS.

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husband and wife,

*Respondents.*

In the Matter of F. S. MAYHEW,

In Bankruptcy.

## RESPONDENTS' BRIEF ON PETITION FOR REVISION.

The statement of facts contained in petitioner's opening brief is in substance correct, but we desire to expand such statement in two particulars. The conveyance of the real property made by the respondents to Willard O. Wayman was, according to the testimony, an attempt upon the part of the bankrupt to rehabilitate himself, Wayman being regarded as a trustee not only for all of his creditors, but also for himself. At this time his lia-

bilities exceeded his assets. The referee in his certificate says:

“The testimony is of a somewhat indefinite character as to the facts concerning this assignment. My inference from the testimony was that it was intended to be for the benefit of all creditors.”

The certificate of the referee and the record as presented, further do not show what appeared by uncontradicted testimony at the hearing, namely: that the bankrupt from a time shortly after his adjudication up to within a few days prior to the filing of his schedules was suffering from a nervous breakdown, being under treatment for a portion of said time in a sanatorium. Therefore, his schedules were filed as promptly as possible by him, including his claim to the homestead exemption, as soon as he was in a condition to take such step, and meanwhile his wife acted in their joint behalf. We believe that such facts will be conceded as a part of the record by the trustee, should they be deemed in any way material by this court.

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### **Argument.**

Upon the facts as stated by the trustee with the foregoing addenda, two questions of law are presented to this court, namely: 1. Is a bankrupt in the State of California entitled to claim a real estate homestead exemption where neither he nor anyone in his behalf has made and recorded a

declaration of homestead as required by the state statutes prior to his adjudication in bankruptcy?

2. Assuming that he would be so entitled, is he precluded from making such a claim by a voluntary conveyance of the real property for the benefit of himself and his creditors or for the benefit of all his creditors, which conveyance the trustee thereunder did not accept and which was made prior to adjudication? It will be noted that question 2 is stated in somewhat different terms from what it is stated by the trustee.

Answering the first question presented by the trustee, we shall endeavor to show that (I) a bankrupt under the laws of the State of California is entitled to claim a real estate homestead exemption where neither he nor any one in his behalf has made and recorded a declaration of homestead as required by the state statutes prior to his adjudication in bankruptcy, A. under the provisions of the bankruptcy act itself without regard to the insolvency law of the State of California; and B. that the bankrupt is entitled thereto under the exemptions allowed by the insolvency act of the State of California; nor C. does the amendment to section 47a of the bankruptcy act made in 1910 have any effect upon either of these propositions. (II) The second question, we believe, should be answered in favor of the bankrupt, whether stated in the terms proposed by the trustee or as hereinabove set forth. Taking these questions up in their order.



**I. A BANKRUPT IN THE STATE OF CALIFORNIA IS ENTITLED TO CLAIM A REAL ESTATE HOMESTEAD EXEMPTION WHERE NO DECLARATION OF HOMESTEAD HAS BEEN MADE AND RECORDED AS REQUIRED BY THE LAWS OF THE STATE OF CALIFORNIA PRIOR TO HIS ADJUDICATION UNDER THE PROVISIONS OF THE BANKRUPTCY ACT, (A) IRRESPECTIVE OF THE PROVISIONS OF THE INSOLVENCY ACT OF THE STATE OF CALIFORNIA.**

This principle was laid down in the case of

In re Culwell, 165 Fed. 828 (D. of Montana).

In this case, just as here, an exemption was claimed in the schedule, but no declaration of homestead had been filed until after adjudication, yet the exemption was allowed, the court saying,

“My opinion is that the court should allow the bankrupt’s claim of exemption and that the trustee should release any control he may be assuming. The basis for this view rests upon construction of the provisions of section 70a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 565, which vests in the trustee in bankruptcy the title of the bankrupt as of the date he was adjudged a bankrupt ‘except in so far as it is to property which is exempt’, etc., and also of section 6a which in so far as pertinent here, provides that the bankrupt act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the state in force when the petition in bankruptcy is filed. I do not construe the bankrupt act as meaning that upon the trustee’s qualifying the bankrupt is deprived of all right to perfect his homestead exemption provided in his schedules he claims a designated piece of realty as a homestead and exempt, and provided he proceeds, under the state statutes, without delay, and provided always there is no fraud involved in the matter of the claim. The bankrupt act,

in its further provision concerning 'the allowance' to bankrupts of exemptions, as provided for under the state law, necessarily contemplates determination by the bankruptcy court of 'claims' for exemptions by the bankrupt in his schedules, and after determination, setting apart or refusal to set apart. Section 7, Cl. 8, Bankrupt Act; *In re Le Vay* (D. C.), 125 Fed. 990.

"Yet the act does not make it a precedent to having a homestead allowed to the bankrupt, claiming the same in the bankruptcy court, that the homestead shall have been designated pursuant to the state statute, prior to the date of adjudication in bankruptcy. *In re Friedrich*, 100 Fed. 284, 40 C. C. A. 378. If the bankrupt has expeditiously and in good faith made his declaration, following the claim in the schedule, the property is exempt and cannot be retained for administration. *In re Fisher* (D. C.), 142 Fed. 205; *In re Brumbaugh* (D. C.), 128 Fed. 977. It has been well said 'Courts of bankruptcy are not controlled as to the time or manner in which claims for exemptions may be preferred in bankruptcy.' *In re Kane*, 127 Fed. 552, 62 C. C. A. 616."

To the same effect are:

*In re Friedrich*, 100 Fed. 284;

*In re Fisher*, 142 Fed. 205;

*In re Brumbaugh*, 128 Fed. 977;

*Goodman v. Curtis*, 174 Fed. 644;

*Pulsine v. Hussy*, 9 A. B. R. 657;

*In re Falconer*, 110 Fed. 111;

*Steele v. Buel*, 104 Fed. 968;

*In re Burnham*, 202 Fed. 762.

We direct the particular attention of the court to the last cited case where this language is used:

“If the homestead exemption is claimed seasonably in the bankruptcy proceeding, it has been held, it may thereafter be perfected under the state law, if the claimant proceeds expeditiously.”

Citing: In re Culwell, *supra*; Goodman v. Curtis, *supra*; In re Fisher, *supra*.

The opinion in the case of

In re Burnham, *supra*,  
also considers the case of

In re Youngstrom, 153 Fed. 58,  
which is cited at some length by the trustee and relied upon by him as a leading authority against the bankrupt in this connection. The District Court of Washington, however, in the Burnham case reviewing all of these decisions, fails to so construe the Youngstrom case.

Remington on Bankruptcy, Vol. 3, Supplement, p. 257,  
cites the Culwell case as authority for this statement in the text:

“However, the mere perfecting of homestead exemption rights by filing a statutory ‘designation of homestead’ may be done after the bankruptcy.”

The case at bar falls squarely within the principles of law announced in the foregoing cases; for in this case after the adjudication but within seasonable time the bankrupt’s wife duly made and



recorded a declaration of homestead for the joint benefit of herself and her husband "under and pursuant to the laws of the State of California", as the trustee states in his petition for revision, and the bankrupt himself at the time of filing his schedules duly claimed the exemption. We therefore submit, without any consideration of the provisions of the insolvency act of the State of California, that the bankrupt is entitled to his homestead exemption duly claimed and perfected in accordance with the bankruptcy act and the state statutes, under the authorities above mentioned; and we further submit that the weight of authority is in favor of the bankrupt's contentions upon this proposition. This brings us to the second subdivision of the first proposition.

## I B.

**A BANKRUPT IN CALIFORNIA IS ENTITLED TO CLAIM A REAL ESTATE HOMESTEAD EXEMPTION WHERE NO DECLARATION OF HOMESTEAD HAS BEEN FILED BY HIM OR ON HIS BEHALF PRIOR TO HIS ADJUDICATION, UNDER THE TERMS OF THE INSOLVENCY ACT OF THE STATE OF CALIFORNIA.**  
(Statutes of California of 1895, page 153.)

The section of the insolvency act in question is paragraph 4 of article 10, and reads as follows:

"It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent, such real and personal property as is, by law, exempt from execution; and also a homestead in the manner provided by section 1465, of the Code of Civil Procedure."

It is manifest that the laws of the State of California on the question of homestead are comprehensive and include all cases. The various sections of the code governing this valuable right are mentioned and referred to by the trustee. Section 1465 of the Code of Civil Procedure was designed to protect the family of a decedent in cases where no declaration of homestead had been filed by the decedent in his lifetime. By the provisions of the insolvency act this right was extended to an insolvent. The case of

In re Schwartz, No. 5906 U. S. Dist. Court, for the Northern District of California, is a leading case in this district. The referee in bankruptcy held that it was his duty under the provisions of the insolvency act to allow a homestead claimed by the bankrupt in his schedules, although no declaration had been filed prior to the adjudication, upon the ground that this provision of the insolvency act was in force. This order of the referee was affirmed by the District Court and the same ruling was made in

In re McCoy, No. 5536 U. S. Dist. Court, for the Northern District of California.

In this case the bankrupt had attempted to file a declaration of homestead prior to his adjudication. Through error this declaration was filed upon property which he had conveyed to a third party and the referee considered the case upon the basis that no declaration in accordance with the state

statute had been recorded prior to the adjudication. The referee in his order uses this language:

“It must be conceded that unless the trustee has a vested right in the premises now sought to be exempted, no adverse interests have intervened and no creditor will be injured by this court granting to the bankrupt that to which he of right would have been entitled in these proceedings had not the error been made. Under the 70th section of the act the trustee is vested, by operation of law, with the title of the bankrupt as of the date he was adjudicated a bankrupt of certain premises therein described, except in so far as relates to property which is exempt. It is now held, as was held in the Schwartz case, that the 60th section of the insolvent law of this state is not in conflict with the provisions of the bankruptcy act, and that it is one of the laws of this state, which was in force, and not suspended, at the date of the filing of the petition in bankruptcy.”

This ruling of the referee was affirmed by the United States District Court for the Northern District of California.

In attempting to override the authority of these cases,

In re Schwartz, *supra*;

In re McCoy, *supra*,

the trustee argues that the term “exemptions” as used in section 6 of the bankruptcy act is restricted to exemptions “from judicial process on execution” and cannot be deemed to apply to exemptions “peculiar to state insolvency laws,” and also that the state insolvency law was not a statute “in force”



within the meaning of section 6 of the bankruptcy act at the time of the taking of proceedings in the case at bar. It would seem that little profit is to be derived from any attempt to limit the meaning of the word "exemptions" as used in section 6, as the act specifically states that they are such as are prescribed by the state laws in force at the time of filing the petition. The homestead is certainly the essence of the term "exemption", and how or in what manner the exemptions provided for in a state insolvency statute are to be distinguished from those exemptions afforded by any other state statute is not apparent. The Civil Code of California provides as follows:

Section 1240:

"The homestead is exempt from execution or forced sale save as in this section provided."

The same code defines the homestead as follows:

Section 1237:

"The homestead consists of a dwelling house in which the claimant resides and the land upon which the same is situated, selected as in this section provided."

Therefore, there would seem to be no argument upon the question that a homestead is an exemption allowed by the state statutes and the bankruptcy court would in any case look to the state statute for an enumeration of the exemptions to which the bankrupt is entitled.

Counsel for the trustee next devotes several pages of his brief to an argument that the state insolvency

act was not a law in force at the time this exemption was allowed by the referee and concludes his argument with the statement that the state insolvency act was completely suspended by the bankruptcy act of 1898. This conclusion is entirely at variance with the case of

*In re Amoratis*, 178 Fed. R. 919.

This case was decided by this court, May 2, 1910, and was a petition for revision of an order of the District Court of the Northern District of California affirming the order made by the referee disallowing the right of priority of payment to a creditor for certain costs incurred in an attachment suit brought by such creditor against the bankrupt, all of which costs were expended prior to the filing of the petition in bankruptcy. The creditor urged that these costs were a first lien by virtue of a priority given under subdivision 5 of section 64b of the bankruptcy act, which provides that among the debts entitled to priority are "(5) Debts owing to any person who by the laws of the states or the United States is entitled to priority". This contention depended upon whether under the insolvency law of the State of California, the petitioner would be entitled to such priority. The court then quoted a portion of the insolvency act which is in question here (Statutes of 1895, page 153), which section provides that such costs under such state law shall be a preferred debt, and the opinion by Judge Ross then proceeds:

“The record in the present proceeding shows that the claim upon which the petitioner brought its attachment suit in the state court was provable and was proved against the estate of the bankrupt. It could not have been so proved, had it not been shown that the costs were incurred by the petitioner in good faith. In like circumstances they would have been provable and entitled to priority in insolvency proceedings under the California statute cited. The fact that under that statute a claim for such costs is entitled to priority, even though the proceedings by the attaching creditor were prompted by the desire to secure a preference, does not, in our opinion, deprive the attaching creditor, whose good faith brings him within the provisions of the bankruptcy act, as well as of the state insolvency act, of priority for such costs necessarily expended. As said by the court *In re Iroquois Mach. Co.*, (D. C.) 166 Fed. 629, 631:

“ ‘It seems to be the policy of the bankruptcy act to recognize both exceptions and priorities created by the state law, though this leads to some diversity in the administration of the bankruptcy act in various jurisdictions. *Holden v. Stratton*, 198 U. S. 202 (25 Sup. Ct. 656, 49 L. Ed. 1018).’ ”

This court has therefore held that the provisions of the state insolvency law relating to priorities of certain claims are still in force and there is certainly no authority or principle for holding that its provisions regarding exemptions should be deemed a nullity.

The trustee goes further with his argument, however, and seeks to show that the administrative features and scheme of title provided for by the in-



solveney act are inconsistent with the theory and provisions of the bankruptcy act, and that therefore the homestead exemptions given by the insolvency act cannot be enforced, quoting section 1465 of the Code of Civil Procedure which is incorporated in the insolvent act. The trustee points out the entire difference in procedure and that under this section the court is empowered to set aside a homestead and not the bankrupt. And further that the bankruptcy act contemplates and provides for the passing of title from the bankrupt to the trustee as of the date of adjudication, and that this provision would be at total variance with the passing of title by the setting apart of a homestead in the bankruptcy proceeding under the provisions of section 1465 of the Code of Civil Procedure. This argument we think is wholly fallacious.

Let us assume that the bankrupt in this case had never selected or perfected a homestead by filing a declaration therefor prior to his adjudication. Let us further assume that the bankrupt's decease occurred before he had filed his schedules or made any claim in the bankruptcy proceedings to a homestead exemption. Section 8 of the bankruptcy act provides:

“The death or insolvency of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner so far as possible, as though he had not died or become insane; provided that in the case of death the widow and children shall be entitled to all rights of dower and allowance fixed by

the laws of the state of the bankrupt's residence."

Under this provision of the act and under the provisions of section 1465 of the Code of Civil Procedure of the State of California, we believe that the widow and children would be entitled to claim a homestead in such event and that the bankruptcy court would be compelled to set the same aside to them, and that the same would be set aside to them under the procedure of the bankruptcy act. The case of

In re Dicks, Dist. Court N. E. D. Ga. S. D.,  
198 Fed. R. 293,

is instructive on this point. It would seem upon a reading of the opinion that the same argument in reference to the vesting of title was made in that case as is made here. The court quotes Collier (8th Ed.), p. 195, as follows:

“The proviso protects all the rights, dower and otherwise granted to the widow and children under state statutes. The clause is a new enactment, but it does not change existing law. The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate, as was the bankrupt. It is not material that the husband died after the vesting of the title in the trustee.’”

In the course of the opinion the court further says:

“Here it is true the deceased did not die actually seized and possessed of the values set apart for the year's support. A statutory, but

not an unqualified title to this had vested in the trustee. But can it be denied that the bankrupt living, or his family when dead, had an 'estate' in the assets? While he lived he had the right to an exemption, he had the right to propose a composition with his creditors, which the court might have ratified and directed the trustee to reconvey the assets to him."

And further:

"To briefly re-state our view of this question, the title of the debtor cast upon the trustee by the bankruptcy law is for distribution to pay the debts. It is not an absolute title. The rank and priority of the debts are almost without exception determined by the law of the state. By the law of Georgia the year's support is to be 'preferred before all other debts', with certain exceptions not material here, and the year's support must be set apart either in property or money from the estate of the deceased. The year's support is then an inchoate lien, with few exceptions, superior to the claims of creditors."

These excerpts will serve to illumine the "twilight zone" to which the trustee adverts.

Upon this whole subject and particularly referring to the case of

In re Anderson, 110 Fed. 141,  
cited by the trustee, we believe that counsel has confused substantive rights with questions of procedure. As we understand the law, the substantive rights of a bankrupt and his family to their exemptions are determined by the state statutes, but



all questions of procedure are determined by the national act. In the Anderson case the exemptions mentioned, if they can be termed such, were made a peculiar feature of the administrative procedure of the state law, and the two procedures in that case were beyond question in conflict. This was unquestionably the basis of that decision. As was said

In re Burnham, 202 Fed. 762.

“The bankruptcy act making no provision, there is no question but that the state law will control as to the extent of and requisites of a homestead exemption; but the time within which such exemptions are to be claimed and the manner of claiming same are fixed by the bankruptcy act itself and its provisions in that respect are controlling.”

It is submitted, therefore, that the insolvency law of the State of California was a law in force at the time this exemption was granted, and that the said law grants to the bankrupt as exempt a homestead under the provisions of the Civil Code and Code of Civil Procedure. Passing now to the third subdivision of this question, namely:

## I C.

### WHAT IS THE EFFECT OF THE AMENDMENT TO SECTION 47A OF THE BANKRUPTCY ACT?

The argument of the trustee upon this question is entirely based upon an assumed construction of the amendment as being directed against exemp-

tions. The clause of the original section in question reads:

“Trustees shall respectively \* \* \* (2) collect and reduce to money the property of the estates for which they are trustees under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest.”

Under the amendment this clause now reads:

“Trustees shall respectively \* \* \* (2) collect and reduce to money the property of the estates for which they are trustees under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.”

The purpose of this amendment was not to bar any exemption given to the bankrupt. The purpose of the amendment is discussed in the case of

In re Williamsburg Knitting Mill, 190 Fed. 871.

This case arose in Virginia, and was decided in June, 1911. The court in this decision says:

“The amendment of 1910 was passed as a result of a decision in the York Manufacturing

Co. case, 201 U. S. 344, and to give the trustee precedence over an unrecorded vendor's lien."

In the York Manufacturing Co. case it was held that the trustee had no better rights than the bankrupt. Remington on Bankruptcy, Vol. 3, at page 331, states that by this amendment the doctrine operates as a remedy, and that the amendment was an attempt to modify the decision in the York Manufacturing Co. case. Remington quotes the report of the Judiciary Committee, which report states that the purpose of the amendment was to meet the case in question.

Collier in the 8th edition of his work, at pages 541 and 542 declares that the purpose of the amendment is the same as above stated and suggests that the amendment should have been to section 70 instead of 47. In the Williamsburg Knitting Mill case the court further says:

"The policy of the act is to clothe the trustee with title as against claims, liens, and equities, and compel everyone to comply with the state statutes respecting recordation and in consequence of failure to do so to lose their claim upon all right to the lien or equity."

The amendment is also construed in

In re Dancy Co., 198 Fed. 336,  
in which it is stated that its purpose is to avoid secret, unrecorded liens of creditors. The purpose of the amendment is further exemplified in

In re Farmers' Supply Co., 196 Fed. 990,  
where it is stated to be.



“It was intended to protect general creditors against the holders of unrecorded mortgages and conditional sale contracts and under such provision the right of a trustee to the property held by the bankrupt under a contract of conditional sale not recorded, or to the proceeds of such property coming into his hands, is superior to that of the seller.”

It is similarly construed in the following cases:

In re Gehris Herbine Co., 187 Fed. 502;

In re Nelson, 191 Fed. 233;

In re Kreuger, 199 Fed. 367.

We have carefully examined the following cases which have arisen since the amendment and indirectly concern questions of exemption, but are of the opinion that they throw very little light on the question presented here.

In re Codori, 30 A. B. R. 453;

In re Farmers' Co-operative Co., 30 A. B. R. 190;

In re Morris, 30 A. B. R. 319;

Pacific States Bank v. Coats, 30 A. B. R. 655;

In re Whatley Bros., 29 A. B. R. 64;

In re Stein, 30 A. B. R. 694;

In re Phillips, 30 A. B. R. 597.

They do, however, serve to bring out one principle which is clearly stated by the United States District Court of the District of North Dakota, in the case of

In re Farmers' Co-operative Co., *supra*,

in the course of its decision this court has the following to say regarding the amendment.

“The history of the statute as given by Remington, Vol. 3, p. 331, and explained In re Farmers’ Co-operative Co., (D. C. Ga.) 28 A. B. R. 535, 196 Fed. 991, and In re Williamsburg Knitting Mill, (D. C. Va.) 27 A. B. R. 178, 190 Fed. 871, shows that it was merely remedial, intended to correct a misinterpretation of the Bankruptcy Act by the courts. This view was also manifest in the face of the statute. It declares that trustees in bankruptcy ‘shall be deemed’ vested with all the rights, remedies, etc. It therefore gives a rule of interpretation rather than a substantive right.”

While none of these cases consider, nor have we been able to discover any reported case which considers the effect of the amendment upon the bankrupt’s exemptions, it is nevertheless apparent from the opinions of the various courts, the report of the Judiciary Committee, and the construction of the amendment by the leading authors upon this subject, that the amendment is in no manner directed against the bankrupt’s claim to exemptions, nor is it possible to see how this could be so, in view of the provisions of section 6 of the bankruptcy act and in this state, in view of the insolvency act.

Upon this topic we feel that there is little to be added to the learned discussion of this question by the referee as contained in his certificate.

Summarizing our argument upon the first subdivision of this brief we find the state statutes of California containing these provisions.

Civil Code, section 1237:

“The homestead consists of a dwelling house in which the claimant resides and the land upon which the same is situated, selected as in this section provided.”

The trustee reads this section as “property which *has been selected* as in this section provided”. While we would read the same section to mean that the homestead is the dwelling house and land *to be selected*. And it will be observed that there is no limit as to the time within which this selection shall be made.

Section 1240:

“The homestead *is* exempt from execution or forced sale except as in this section provided.”

This section is the only provision of our law stating that the homestead is exempt from execution or forced sale and of itself prescribes an exemption. Though there are various provisions as to the selection of a homestead by the party himself, his wife, or by the court, our state law contemplates that provision must be made for the selection of a homestead whenever claimed, because the homestead is an exemption prescribed.

Section 1262:

“In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowl-



edged, a declaration of homestead, and file the same for record."

Paragraph 64, section 10 of the Insolvent Act of 1895 states that:

"It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner provided by section 1465 of the Code of Civil Procedure."

and section 6 of the National Bankruptcy Act of 1898 provides that this act shall not affect the allowance of the bankrupt's exemptions which are prescribed by the state law in force at the filing of the petition, etc.

If the procedure prescribed by section 1262 must be followed in all cases in order to create the homestead, then there can be no such thing in California as a homestead exemption when that procedure has not been followed. Yet C. C. P., section 1465, directs the court to set aside property of a decedent including the homestead selected by him in his lifetime and "if none has been selected, designated, and recorded" the court must set apart, select, and cause to be designated a homestead. Manifestly the creation of the exemption does not depend upon the action of the party himself. The conclusion seems irresistible that a homestead exemption is prescribed by law and is one of the rights guaranteed to a resident of California, and the procedure for selecting and claiming that right is as follows:

1. Where neither death nor insolvency proceedings have ensued by designating and recording his selection or declaration under section 1262 of the Civil Code.

2. Where death has ensued, the selection shall be made by the court by petition therefor under section 1465, C. C. P.

3. Where proceedings in insolvency under the state law have been commenced the selection shall be made by the court upon petition therefor under paragraph 64, section 10 of the Insolvency Act.

4. Where there has been an adjudication under the bankruptcy act the claim for exemption must be made in the schedule by the bankrupt under section 7 of the bankrupt act.

The foregoing is merely the procedure which the party or his heirs must adopt to make known his claim with such certainty that his legal standing may be known and the homestead set apart. The exemption is not made because of any benefit to the state by reason of the procedure to claim a homestead. It is made in order that this man and his family shall not be rendered homeless by the avarice of creditors. Section 6 of the bankruptcy act was designated to protect this right, and the courts have repeatedly and unanimously held that this right should be guarded and conserved with the greatest liberality.

It is submitted that, if there were no national act in existence, this bankrupt and his family would, under the state statute, be protected in the homestead. Yet the national act expressly declares in

section 6 thereof that the act shall not affect the allowance of the exemption to the bankrupt prescribed under the laws of his state, but this is exactly what the trustee is seeking to accomplish through his construction of the bankruptcy law; to wit: a nullification of the exemptions prescribed by the state and in which the bankrupt would be secure under the laws of the state.

We do not deny that, so far as the administrative features are concerned, all state statutes relating to the bankrupt's property, including the state insolvency law are in abeyance. But those portions of our state law which prescribe the exemptions to be allowed to the bankrupt, are expressly continued in force by section 6 of the bankruptcy act.

## II.

**THE CONVEYANCE BY THE BANKRUPT AND HIS WIFE OF THE REAL PROPERTY IN QUESTION FOR THE BENEFIT OF HIMSELF AND HIS CREDITORS IN AN ATTEMPT AT REHABILITATION OR FOR THE BENEFIT OF ALL HIS CREDITORS DOES NOT PRECLUDE THE MAKING OF A CLAIM FOR A HOMESTEAD EXEMPTION.**

The bankrupt and his wife did convey the property prior to the adjudication. As we have pointed out the referee's certificate does not show all of the facts according to the testimony in relation to this transfer, but the referee finds that it was "intended to be for the benefit of all creditors," and



the trustee at page 31 of his opening brief takes the same view, terming it a transfer "for the benefit of the creditors of the bankrupt". All the authority cited by the trustee in his argument, however, concerns cases where a transfer was made as a preference. We desire to direct the attention of the court to this fact, that the trustee was appointed December 13, 1912, and that on the 20th day of December, 1912, just one week later, the transferee, Mr. Wayman, delivered the property so conveyed to him to the trustee. There is therefore no authorization or basis for the inference to be gained from some of counsel's argument to the effect that the property was "recovered". The fact is that this was an attempt in good faith upon the part of the bankrupt to protect his creditors and himself and that as the referee states:

"My conclusion upon this point is that the conveyance to Willard O. Wayman was in trust for the creditors which trust was never executed, being avoided by the bankruptcy proceeding."

We therefore submit that the authorities and argument made by the trustee upon this question are not in point, and that the deed was of no effect at all. There is no allegation or claim of fraud upon the part of the bankrupt; there is no allegation or claim that the bankrupt intended to prefer any creditor. The attempted conveyance was a nullity. An attempt to transfer under such circumstances

had no effect upon the bankrupt's claim to the homestead.

Bashinsky v. Talbott, 9 A. B. R. 513; 119 Fed. 337;

In re Falconer, 6 A. B. R. 557; 110 Fed. 111;

In re Soper, 173 Fed. 116.

Even were the transfer fraudulent, there is abundant authority on the point to the effect that it would not bar the bankrupt's claim to exemption upon the recovery of the property by the trustee. We beg to again refer to the referee's opinion on this question found in his certificate (Petition for Revision, pages 18 and 19).

In conclusion it is submitted on behalf of the bankrupt and his wife that the order of the District Court affirming the order of the referee allowing the homestead exemption should be affirmed.

Respectfully submitted,

HARTLEY F. PEART,

ERNEST K. LITTLE,

*Solicitors for Respondents.*







No. 2421

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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ARTHUR H. BRANDT, as trustee of F. S.  
MAYHEW, in bankruptcy,

*Petitioner,*

vs.

F. S. MAYHEW and MRS. F. S. MAYHEW,  
husband and wife,

*Respondents.*

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In the Matter of F. S. MAYHEW,

In Bankruptcy.

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## PETITIONER'S CLOSING BRIEF.

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Counsel for respondents add to the facts stated in the petitioner's opening brief certain other facts which are not disclosed by the record but which they state were shown by the testimony taken before the referee. Even were it conceded that these facts were true, and this court could consider them on this petition, they have little or no bearing on the case. The trustee has made no

point on the delay of the bankrupt in claiming his exemptions in bankruptcy, provided that he is otherwise entitled to them. The sole question in issue is whether or not respondents are entitled in any event to the exemption claimed, or whether, on the contrary, they are precluded from claiming it by reason of their failure to perfect the homestead prior to adjudication by filing their declaration as provided by the state law or by reason of their voluntary transfer of the property for the benefit of the creditors of the bankrupt.

The propositions contained in respondents' brief have to a large extent been already answered in the petitioner's opening brief. There are some matters, however, which require further notice. These will be noted as briefly as possible, preserving, for the purpose of clarity, the outline presented in respondents' brief.

#### 1A.

The first position of petitioner in his opening brief was that the bankrupt is not entitled to claim a homestead exemption under the general homestead laws of the State of California for the reason that neither he nor any one in his behalf had perfected such a homestead as required by the state law, prior to his adjudication. In support of this proposition the case of *In re Youngstrom*, 153 Fed. 58; 82 C. C. A. 232, was cited. The attention of the court was called to the fact that there was one or two District Court decisions



to the contrary, notably the cases of *In re Culwell*, 165 Fed. 828, and *In re Fisher*, 142 Fed. 205.

In answer to this position of the petitioner, respondents quote at length from the case of *In re Culwell*, *supra*, and cite a number of other cases as supporting this holding. An examination of these cases fails to show that they are at all pertinent. In the case of *In re Friedrich*, 100 Fed. 284, it was held that in case of a copartnership which had filed a petition in voluntary bankruptcy, an actual severance of the stock in trade of that portion which was claimed exempt need not be made at the time of filing the petition in bankruptcy, since the state law provided that such a severance could be made even after levy of execution. In the case of *In re Brumbraugh*, 128 Fed. 97, it was held that a bankrupt was entitled to claim his exemption in bankruptcy as against a judgment creditor holding a judgment for breach of promise of marriage, notwithstanding the fact that by the state law the exemption could not be claimed on execution on a judgment based on tort, this on the ground that the creditor could reach the property after it had been set aside in bankruptcy. The case of *Goodman v. Curtiss*, 174 Fed. 646, holds only that a bankrupt does not lose his right to claim an exemption by his failure, through the mistake of his attorney, to claim it at the time of filing his petition,—this by virtue of the right of amendment accorded by General Order XI. The

cases of *Steele v. Buel*, 104 Fed. 968, and *Pulsine v. Hussy*, 9 A. B. R. 657, hold only that the provision in subdivision 5 of Section 70 of the Bankruptcy Act excluding from property that passes to the trustee, life insurance policies possessing a cash surrender value, etc., applies only in those jurisdictions in which a policy is not exempt by the state law; that it restricts but does not enlarge the title of the trustee and does not limit the provisions of Section 6. It is difficult to see how any of these cases have any bearing whatever upon the question in issue; viz., whether a bankrupt is entitled to claim a homestead that has not been created as required by the laws of the state.

The case of *In re Burnham*, 202 Fed. 762, though that case involved a question of homestead, is not a decision that supports the respondents' position since in that case the court held that, even on the assumption that the bankrupt would be entitled under the decisions of *In re Culwell* and *In re Fisher*, to perfect his claim in bankruptcy after adjudication, he had in any event delayed too long and was therefore precluded. An analysis of the authorities therefore, shows the situation substantially as stated in petitioner's opening brief. In support of the petitioner's position is the case of *In re Youngstrom*, a decision of the United States Circuit Court of Appeals for the Eighth Circuit; to the contrary are the District Court decisions of *In re Culwell* and *In re Fisher*.

The reasoning of the court in the case of *In re Culwell*, as appears from the extract cited in respondents' brief, does not commend itself as either logical or permissible under the provisions of the Bankruptcy Act. It may be entirely true that the Act does not make it a precedent to having a homestead allowed to the bankrupt that the homestead shall have been designated pursuant to the state statute prior to adjudication in bankruptcy, and that "courts of bankruptcy are not controlled as to the time or manner in which claims for exemption may be preferred in bankruptcy". The court, however, entirely overlooks the fact that under statutes similar to the general homestead laws of California, there is no homestead, and consequently no exemption, until the statutory requirements have been complied with. To permit the bankrupt, after adjudication, to take the statutory steps, is to permit him *to create* an exemption that did not exist at the date of his adjudication. Such a position, as pointed out in the *Youngstrom* case, is impossible under the provisions of the Bankruptcy Act. The holding of the latter case, and the reasoning of the court therein is, it is submitted, unanswerable on any proper construction of the provisions and application of the Bankruptcy Act.

#### 1B.

The second position taken by the petitioner in his opening brief was that the bankrupt can not predi-



cate his right to an exemption on the provisions of the Insolvent Act of the State of California for the reasons (1) that the right given to the bankrupt thereby is not an "exemption" as that term is used in Section 6 of the Bankruptcy Act; and (2) that even if it is, it is not one "prescribed by a state law in force".

Respondents direct the attention of the court to the case of *In re Schwartz* and *In re McCoy*, Nos. 5906 and 5536, respectively, in the District Court for the Northern District of California, and to an extract from the opinion of the referee in the latter case. In neither of these cases did the District Court file an opinion and it does not appear upon what grounds the respective orders of the referees in those cases were affirmed. If the cases are cited as authority or precedent it will suffice to say that the purpose of this petition is to review the ruling in those cases as well as that in the case at bar, and to secure a final and authoritative determination of the questions there involved.

In answer to petitioner's argument that the word "exemption" as used in Section 6 of the Bankruptcy Act applies only to "exemptions from execution" and has no reference to a right that is only given by the state Insolvent Act, to be availed of in insolvency proceedings, respondents content themselves with merely citing Section 1240 of the Code of Civil Procedure to the effect that "the homestead is exempt from execution or forced sale, save

as in this section provided''. They seek to deduce from this section, presumably by the use of the word "exempt" that a homestead of *any* character is necessarily "an exemption". It will suffice to say in answer to any such argument that the homestead mentioned in Section 1240, as heretofore stated, does not arise or come into existence until the filing of the statutory declaration as provided in Sections 1262 and 1263. Section 1265 provides that "*from and after the time the declaration is filed for record* the premises thereon described constitute a homestead". It is true that this homestead is "exempt" but *there is no homestead* until it has been perfected as provided by these sections. Obviously the term "exempt" as here used refers solely to the statutory homestead provided for in that and the succeeding sections of the Civil Code. There is no provision in any statute of the state so far as we can ascertain that employs that term in connection with a purely "probate" or "insolvent" homestead. If the latter is an "exemption", therefore, it must be so for some reason other than the use of that term in Section 1240.

Petitioner further argued in his opening brief that whether the right accorded by paragraph 64 of the Insolvent Act was an exemption or not, it was in any event not one that was "prescribed by the state law in force" since the Insolvent Act was suspended by the national Bankruptcy Act. In answer to this respondents rely simply upon the case of *In re Amoratis*, 178 Fed. 919, in which

this court held that a creditor was entitled to claim a priority in bankruptcy that was provided for in the Insolvent Act of the state. Just how this decision bears upon the question as to the suspension of the Insolvent Act by the Bankruptcy Act, does not appear. As far as the opinion discloses, no such question was presented in the case, and it is not discussed by the court. The right of priority allowed to the creditor by the Insolvent Act was allowed in bankruptcy by reason of the express provisions of subdivision 5 of Section 64 of the Bankruptcy Act. That provision provides that priority is to be given to such creditors "who by the laws of the states or the United States are entitled to priority". The "laws of the state" referred to are not limited to "laws in force" as provided by Section 6. Accordingly, there is no inconsistency between the holding of the court in this case and the general proposition that the Insolvent Act is in complete abeyance.

The question as to the extent of the suspension of the Insolvent Act is not entirely free from difficulty as even a casual reading of the cases and text writers will show. The more recent decisions, however, and the present weight of authority as stated in the opening brief is that the state laws are in complete abeyance. This is the position of Samuel Williston, an authority on the law of bankruptcy, in an article in the Harvard Law Review ("The Effect of a National Bankruptcy Law Upon



State Laws", 22 H. L. R. 547), a position which on logic and principle seems to be unassailable.

But however this fact may be, there can be no question that the Insolvent Act is at least suspended in all particulars in which it is inconsistent or in conflict with the national act. This fact is not questioned by respondents in their brief. It was pointed out in the opening brief that the provision of the Insolvent Act in question was in such conflict for the reasons (1) that there is no provision in the Bankruptcy Act for the jurisdictional procedure of the state act; (2) that the discretion given the judge in the Insolvent Act is not available to the judge in bankruptcy; and (3) that the provisions of the Insolvent Act are at variance with the scheme of title of the national act.

The only answer made to this latter position by respondents is the citation of the case of *In re Dicks*, 198 Fed. 293. This case holds that a widow of a bankrupt is entitled to an allowance provided by the state laws on the death of the bankrupt, pending bankruptcy proceedings. Just what bearing this decision has is not apparent, since a widow's right, on the death of the bankrupt, is not here involved. The right here accorded by the District Court of Georgia is expressly reserved to the widow and children of a deceased bankrupt by Section 8 of the Bankruptcy Act. Further, the case itself, even if pertinent on any theory, is totally at variance with the case of *In re McKenzie*,

142 Fed. 383, a Circuit Court of Appeals decision, and is at present pending in the Supreme Court of the United States on certification by the Circuit Court of Appeals. If it be cited merely for the dictum that the title of the trustee is not an absolute title but one simply for the distribution to creditors, it is difficult to see what pertinency even that fact has. Whether the title of the trustee be for distributive purposes or an absolute title, is immaterial, since in any event, by the very provisions of Section 70, it is vested in the trustee as of the date of adjudication. It cannot be held in abeyance until long after that date,—a result that follows from the application of the provisions of the Insolvent Act. If this case illumines the “twilight zone” referred to by petitioner in his opening brief, therefore, it does so but very dimly.

The respondents do not in any way distinguish the case of *In re Anderson* cited by petitioner in his opening brief. They simply say the two procedures involved in the state law and the Bankruptcy Act in that case were beyond question “in conflict” and that this was unquestionably the basis of the decision. On the contrary, the court did not confine its decision to any such ground. Judge Lowell expressly holds that the rights accorded by the provisions of the state Insolvent Act were suspended by the passage of the Bankruptcy Act, and further, that there was no place in the Bankruptcy Act for the exercise of the

discretion of a judge of probate as contemplated in the Insolvent Act, one of the positions taken by the petitioner herein. This opinion of Judge Lowell, both by reason of the ability of the learned judge and by reason of his evident reluctance in reaching his conclusion, is entitled to careful consideration.

Before closing this branch of the case, we desire to call the court's attention to an inadvertence in the opening brief. In arguing the proposition that the jurisdictional procedure requisite for the setting aside of the homestead under the Insolvent Act of the state is not available in bankruptcy reference was made to the requirements of Section 1465A of the Code of Civil Procedure, providing for notice, etc. This was not necessary since paragraph 64 of the Insolvent Act itself provided for such notices, a fact which was inadvertently overlooked by the petitioner in preparing his brief. The concluding clause of paragraph 64 of the Insolvent Act is as follows:

“But no property or homestead shall be set apart, as aforesaid, until it is first proved that notice of the application therefor has been duly given by the clerk, by causing to be posted in at least three public places in the county at least ten days prior to the time of such hearing, setting forth the name of said insolvent debtor, and the time and place appointed for the hearing of such application, which said notice shall briefly indicate the homestead sought to be exempted or the property sought to be set aside; and the decree must show that such proof was



made to the satisfaction of the court, and shall be conclusive evidence of that fact”.

### 1C.

In answer to the contention of the petitioner that even if the bankrupt were otherwise entitled to claim his homestead exemption under the Insolvent Act, he is precluded from doing so by the express provisions of Section 47A (2) of the Bankruptcy Act as amended in 1910, respondents content themselves with a statement of the immediate purpose of the passage of the amendment. As stated in the opening brief there is no question that the immediate occasion of the passage of the amendment of 1910 to Section 47A (2) was the decision in the York Manufacturing Company case. As pointed out, however, the terms of the amendment are clear and unambiguous, and consequently must be given effect in all situations in which, by its terms, it is applicable. It will serve no useful purpose to discuss this matter again at length, since it is fully considered in the opening brief.

In the summary of their argument, on the first main point, respondents state that the trustee reads Section 1237 as “property which has been selected”. How any other reading can be given to the section it is impossible for the petitioner to conceive. Most certainly there is no homestead under the provisions of that title of the Civil Code until a declaration has been recorded as provided therein. As a matter of fact, as heretofore pointed out, Section 1266

expressly provides that the homestead only exists "*from and after the time the declaration is filed for record*". A homestead when selected is of course an exemption made so by the direct provisions of the statute, but how it can be, in any definition of the term, such an exemption until it actually comes into existence, does not appear. Respondents throughout their brief confuse the "homestead" as used in Title 5, Part 4 of the Civil Code and the "probate" or "insolvent" homestead referred to in the Insolvent Act and Section 1465 of the Code of Civil Procedure, and discuss them on the assumption that they are one and the same thing. Such a position, of course, is untenable and leads only to confusion in discussion.

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## II.

In answer to the second main point of petitioner that in any event the bankrupt and his wife have precluded themselves from claiming a homestead exemption in bankruptcy by their voluntary conveyance of the real property for the benefit of creditors, respondents simply rely on the cases cited by petitioner in his opening brief.

The statement that all of the cases cited concern preferential transfers is not strictly true. The cases of *In re Staunton*, 117 Fed. 507, and *Bashinka v. Talbott*, 119 Fed. 337, are both cases of assign-

ments for the benefit of creditors. In the case of *In re Staunton*, the District Court of the Eastern District of Pennsylvania held that where a bankrupt had voluntarily delivered personal property to an assignee for the benefit of his creditors out of which he could have claimed his exemptions, he thereby precluded himself from subsequently claiming an exemption in the proceeds of the sale of such property. The court, in this connection, said:

“I repeat he must be the owner of the articles, either cash or chattels, which are to be set apart for his use, for his ownership merely continues and is not created by his claim and the proceedings thereunder. The application of this rule forbids the allowance of the item that is now contested. He did not own the cash in question when the petition in bankruptcy was filed, and he never had owned it. It belonged to his creditors, the legal title being in the assignee or trustee, and for this reason it was beyond his reach.”

In the case of *Bashinka v. Talbott*, *supra*, the bankrupt had, prior to his adjudication, assigned a judgment to a trustee for the benefit of his creditors. The judgment was collected after adjudication in bankruptcy, and the bankrupt claimed an exemption in the proceeds. By a divided court, it was held that he was not precluded from claiming his exemption on the ground that there had been no fraud. Judge Pardee, however, in dissenting, said:

“Talbott was put into bankruptcy because of the assignment of the Lan-



caster judgment. Up to the adjudication in bankruptcy there seems no pretense that under the law of Georgia he could have assigned a homestead out of the proceeds of the judgment. In effect, the bankrupt's creditors sued for and recovered the proceeds of the judgment (for it was done by their trustee), and thereupon Talbott applies for and is allowed a homestead out of those proceeds. It would be interesting to know under what law Talbott gets his homestead. It is not supposed that the bankruptcy law allows any homestead to bankrupts except as otherwise entitled. The law of Georgia does not allow a debtor a homestead out of the property that he has voluntarily sold and conveyed. I think the learned judge of the court below and my brethren here have been too liberal with the property that should under the bankrupt law go to Talbott's creditors."

As pointed out in the opening brief the error of the majority opinions in *In re Falconer*, and in *Bashinka v. Talbott* and of the opinions in the other cases cited by respondents, comes from a failure to distinguish between fraudulent transfers and transfers which in their nature are merely voidable, such as preferential transfers and transfers for the benefit of creditors. As pointed out, *by the very terms of Sections 67 and 70 of the Bankruptcy Act*, a fraudulent transfer is null and void and does not preclude the claim of exemption. The character of the fraudulent transfer referred to in these sections has been discussed by the Supreme Court in the case of *Corder v. Arts*, 213 U. S. 223; 53 L. Ed. 772. In that case Justice Day in holding that a preferential transfer could not be held

to be included within the fraudulent transfers provided for in Section 67, said:

“We are of the opinion that Congress in enacting 67e and using the terms ‘to hinder, delay or defraud creditors’ intended to adopt them in their well known meaning as being aimed at conveyances intended to defraud. In Section 60 merely preferential transfers are defined and the terms on which they may be set aside are provided; in 67e transfers fraudulent under the well recognized principles of the common law and the Statute of Elizabeth are invalidated. The same terms are used in Section 3, Subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are *actually fraudulent*.”

A preferential transfer as pointed out by the court in that case, and as is expressly provided in Section 60, subdivision b, is merely voidable. The same, of course, is necessarily true of a transfer for the benefit of creditors, since it is for all purposes legal and valid unless bankruptcy intervenes. (Remington on Bankruptcy, Sec. 1606, page 977, and cases cited; Loveland on Bankruptcy, 4th Ed., page 329, and cases cited.) The conclusion, therefore, is unavoidable, that in the cases of preferential transfers and transfers for the benefit of creditors the title passes, and consequently at the date of adjudication there can be nothing out of which the bankrupt can claim his exemption. No other conclusion is logically possible.

Apart from the foregoing considerations, no good reason appears why the bankruptcy court should intervene to help the bankrupt and his wife claim an exemption out of property which they have voluntarily and without any reservation, transferred for the benefit of all their creditors. Their action in voluntarily submitting all their property for the satisfaction of their valid debts was morally and legally commendable. While the federal courts may be liberal in permitting the bankrupt his exemptions, this liberality should certainly not go to the extent of countenancing the reviving of a claim voluntarily waived.

Respectfully submitted,

R. H. CROSS,

*Attorney for Petitioner.*





No. 2421

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR H. BRANDT, as trustee of F. S.  
MAYHEW, in bankruptcy,

*Petitioner,*

vs.

F. S. MAYHEW, and MRS. F. S. MAYHEW,  
husband and wife,

*Respondents.*

In the Matter of F. S. MAYHEW,

In Bankruptcy.

## PETITION FOR A REHEARING.

R. H. CROSS,

Mills Building, San Francisco,

*Attorney for Petitioner.*

**Filed**

Filed this \_\_\_\_\_ day of November, 1914.

NOV 10 1914

F. D. MONCKTON, Clerk.

By \_\_\_\_\_ Deputy Clerk.





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## PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

The petitioner in the above entitled cause respectfully prays that a rehearing may be had of the decision of this Court denying the petition for revision and affirming the order of the District Court.

This petition is not filed for the purpose of delay, for the petitioner, as trustee, is as desirous as the exemption claimants that the administration of the estate may be closed as expeditiously as possible consistent with a final determination of the rights of all parties involved, but solely for the reason that he is strongly convinced that the decision of the Court on at least two of the important questions decided is untenable on any possible construction of the Bankruptcy Act. We are persuaded that the desire on the part of the majority of the Court to grant the homestead exemption has led them to go far beyond the limits within which such liberality can legally be indulged in.

In demonstrating that the claimants in the present case were not entitled to the homestead exemption claimed, the petitioner in his written briefs and on oral argument contended for the two following fundamental propositions: Firstly, that a bankrupt in the State of California is not entitled to claim a real estate homestead exemption where no declaration of homestead, as required by the state statutes, has been filed prior to the adjudication in bankruptcy; and Secondly, that assuming that he would otherwise be so entitled, he is precluded from subsequently making such a claim by a voluntary conveyance of the real property for the benefit of creditors made prior to the petition and adjudication in bankruptcy.

In support of the first of these two main contentions, the petitioner argued (a) that the bank-

rupt could not make such claim under the general homestead law of the State of California set out as Title V, Part IV of the Civil Code (under which, in fact, he did claim), because neither he nor any one in his behalf had taken the necessary statutory steps to create the homestead prior to adjudication; (b) that he could not claim such homestead exemption under Paragraph 64 of Art. X of the Insolvent Act of 1895 of the State of California, because that Act was suspended by the National Bankruptcy Act, and was neither "an exemption" nor "a law in force" such as contemplated therein; and (c) that even if the bankrupt could claim under either of these two sets of statutes prior to 1910, he was effectively precluded from so doing by the application of Section 47A(2) of the Bankruptcy Act as amended in that year. The Court having held adversely to the contention of petitioner on the first of these questions (a) did not discuss whether the right could be claimed under the Insolvent Act (b), evidently considering that the determination of that question was not necessary for the decision. With reference to the third contention of petitioner (c), while we think there was and is considerable merit in petitioner's contention that Section 47A(2) as amended in 1910 must be given the effect required by its express terms, we fully appreciate the force of the Court's statement that it was passed for a particular purpose, and that this purpose is to be taken in consideration in its construction and application. We



very earnestly urge, however, that neither the letter nor the spirit of the Bankruptcy Act supports the conclusion of the Court on the two more fundamental questions involved.

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## I.

The Court holds that a bankrupt in the State of California has a right to a homestead exemption to the extent of \$5000.00 out of real property occupied by himself and his family, even though no declaration of homestead has been filed by him or by any one on his behalf prior to his adjudication as a bankrupt; and that irrespective of the bankrupt's right in the premises, his wife is entitled to file such declaration subsequent to adjudication, and claim the exemption.

We have experienced considerable difficulty in ascertaining the exact grounds upon which the Court bases its holding that the bankrupt, under these circumstances, is not precluded from claiming his exemption. From a careful reading of the opinion it would appear that the Court reached its conclusion on the theory that the mere procedural principle "that the Bankruptcy Act is controlling as to the time and manner of claiming exemptions", in some manner excused compliance with the state law prior to adjudication. That this is so seems to be shown by the following language of the Court:

"While exemptions allowed a bankrupt are fixed and defined by the law of the state of his domicile, *the Bankruptcy Act is controlling as*

*to the time and manner of claiming, selecting and allowing exemptions*, and the courts have given these provisions of the Act a liberal and equitable construction. In *Smith v. Thompson*, 213 Fed. 335, Judge Hook said: 'In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice. It should be helpful to those whose condition requires them to invoke it.' The contention of the trustee is based upon the language of Section 70a, which provides that the trustee shall be vested by operation of law with the title of the bankrupt's property except as to property which is exempt, which provision, it is said, shows the intention of the law to be that property, in order to be excepted, must be recognizable as exempt at the date of the adjudication. *But Section 70a does not deal with the time or manner of claiming exemptions. Those matters are regulated by other provisions.* Section 7, cl. 8, gives to the involuntary bankrupt, the right to claim his exemptions within ten days after the adjudication, and the time within which he may do so may be further extended by amendment, as authorized by General Order XI. \* \* \*

"But it is urged that the bankrupt in this case did not claim his homestead until after his right to claim it as exempt under the bankruptcy law had expired, in that, although he was adjudged a bankrupt on February 8, 1912, he did not claim the exemption until February 17, 1913. But it appears from the record that the bankrupt did not file his schedules until the date last mentioned, and that in his schedules, as he was permitted by law to do, he made his claim of exemption of a homestead. The reason for the delay in filing the schedules is

not explained in the record. No question is made, however, of the bankrupt's right to file them on the date mentioned. We may assume that the Referee, upon good cause shown, permitted them to be filed of that date."

There is no controversy as to the rule "that the time and manner of claiming exemptions are controlled by the provisions of the Bankruptcy Act", and the petitioner has at no time questioned this principle. Nor has the petitioner at any time made any point on the fact that the bankrupt did not file his schedules or make his claim within the time stipulated in the Act. On the contrary, in Petitioner's Reply Brief (pages 1 and 2) he expressly states that "the trustee has made no point on the delay of the bankrupt in claiming his exemptions in bankruptcy provided that he is otherwise entitled to them".

We think that the Court has confused the question of *procedure* for claiming an exemption in the bankruptcy proceedings with the question of the *substantive right* to the exemption. Obviously, to entitle a bankrupt to an exemption two things must concur: First, *the right* to the exemption must be accorded by the state law, and; Secondly, the exemption must be claimed by the bankrupt in the bankruptcy proceedings at the time and in the manner prescribed by the bankruptcy law. Though both of these facts must exist before the exemption right can be successfully claimed, it is obvious that as pre-requisites to the assertion of such claimed



right they are distinct. The mere fact, for example, that a bankrupt has made claim to an exemption at the time and in the manner prescribed by the Bankruptcy Act does not in itself entitle him to the exemption *unless the fundamental right, irrespective of the time and manner of claiming it, is accorded by the state law.*

“*The mere act of a bankrupt in claiming a homestead exemption in the schedule filed by him is not a compliance with Code Va. Sec. 3631, providing that in order to secure the benefit of the exemption of real estate, the homesteader shall, by a writing filed by him and duly submitted to record to be recorded as deeds are recorded, declare his intention to claim such benefit and select and set apart the real estate to be held by him as exempt.*”

In re Garner, 115 Fed. 200.

“That a bankrupt’s right to an exemption must be deduced from the state law is unquestionable; but it is no less true that, *where the right exists*, it is to be asserted in the manner which the Bankruptcy Act itself prescribes.”

Lipman v. Stein, 134 Fed. 235.

“The exemptions provided by the law of the state are allowed by the Bankruptcy Act, but the manner of claiming such exemptions and of setting apart and awarding them is regulated by the Bankruptcy Act.”

In re Kane, 127 Fed. 552.

The principle that an exemption must be claimed at the time and in the manner prescribed by the Bankruptcy Act is a rule relating merely to the

*procedure* requisite to assert the right in bankruptcy proceedings, and, necessarily, presupposes the existence of that right.

The petitioner has always assumed for the purpose of the discussion of this case that the bankrupt did claim the homestead in the bankruptcy proceedings at the time and in the manner provided for by the Bankruptcy Act, viz: that in asserting his claim he followed the procedure prescribed by the Act. The fundamental question, however, is: *Did the bankrupt at the point of time when such right must exist, have a substantive right to the exemption under the laws of the state?* This question can be answered only by a determination of the exact time when such right must exist to be availed of in bankruptcy and by a determination of the nature of the right accorded by the state law.

It is so well established that the date of the adjudication in bankruptcy is the "line of cleavage" and fixes the status of all property, including exemptions, that we never conceived there could be any controversy about the fact until a contrary suggestion was made by the Court in this case. Mr. Remington, in his work on bankruptcy, thus states the principle:

"The date of the adjudication in bankruptcy fixes the status as to exemptions. If the bankrupt then was entitled to the exemptions he claimed, the property remains his property free from the claims of creditors, notwithstanding he may no longer be entitled to exemptions at the time the trustee is ready to set apart

exempt property. The date of adjudication is the line of cleavage. That date severs his old estate from his new estate; his old creditors from his new ones. Since the exempt property is taken away from the old estate, and the last moment of the growth or life of the old estate is the moment the debtor is adjudged a bankrupt, it follows that that moment is the moment which fixes the status of the property."

Vol. I, Sec. 1025, page 575.

This principle necessarily follows from the express provisions of Section 70a of the Bankruptcy Act, and has never so far as we have been able to ascertain, been seriously questioned. In the case of *In re Mayer*, 108 Fed. 599, the Circuit Court of Appeals for the Seventh Circuit said:

"The intention of this statute, is, without doubt, that the creditors shall have all of the estate of a bankrupt which is not exempt, and that the bankrupt shall the exemptions allowed by the law of his domicile *determined by relation to the date of adjudication.*"

The only question in the mind of the Circuit Court of Appeals for the Eighth Circuit in the case of *In re Youngstrom*, 153 Fed. 97, was whether the "line of cleavage" was the date of filing the petition or the date of adjudication. That the status of the property could be affected by any means after the latter date, was not even suggested as a possibility.

"Indeed, we think the statute admits of doubt only in respect of whether the right to any claimed exemption is to be determined as of the time of the filing of the petition, or as



of the time when the debtor was adjudicated a bankrupt. That it is to be determined as of the earlier date as suggested by those provisions of Sec. 6, Sec. 7, cl. 8, and Sec. 70a, cl. 5, which make the time of the filing of the petition of special significance, and that it is to be determined of the latter date is suggested by the provision in Sec. 70a that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt."

It must be taken, therefore, as settled beyond all controversy, that irrespective of the mere time or manner of claiming it in bankruptcy, the exemption, if it is to be successfully asserted, must have existed at the date of adjudication. If this be true, it is absolutely impossible to conceive how a bankrupt is entitled to a homestead exemption where, at the date of adjudication no such homestead and no such right existed. To say that he can take the necessary statutory steps after adjudication, and by so doing claim his exemption, is not, as suggested by the Court, merely permitting him to "perfect" his exemption, but is giving him a right to *create* an exemption that did not in any possible view of the case exist at the date of adjudication.

If the homestead right here involved was a general right not dependent upon compliance with any statutory pre-requisites, the position of the Court would undoubtedly be correct. In such a case, the exemption would necessarily have existed at the date of adjudication. In the present case,

however, and this is the all important and determining factor, *there was no homestead, and, consequently, no possible exemption at the date of adjudication.* The right in the State of California is not a general one to be availed of at any time, but is only one that can be availed of when it has been created as provided by the statutes. Section 1262 of the Civil Code provides that in order to select a homestead a declaration of homestead must be executed, acknowledged and recorded in the same manner as a grant of real property. Section 1265 provides that,

*“from and after the time the declaration is filed for record the premises therein described constitute a homestead.”*

In view of these provisions of the state statutes only one conclusion is possible: at the date of adjudication no declaration of homestead having been filed, there was no homestead, and consequently no exemption right on the part of the bankrupt.

The argument of the majority in their opinion is in effect this:

*“The time and manner of claiming exemptions is controlled by the provision of the Bankruptcy Act, therefore, no declaration of homestead need be filed prior to adjudication.”*

From what has been said it is apparent that these two propositions are wholly unrelated, and that the conclusion is an absolute “non sequitur”.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, in the case of *In re Young-*

strom, written by Judge Van Devanter, now an associate justice of the Supreme Court, from which extracts are quoted at length in the dissenting opinion, and which has been entirely ignored by the majority of this Court, settles this identical question beyond all controversy. We submit that if there is any distinction between that case and the case at bar on this branch of the case, it should be pointed out by the Court. Or, if the majority of this Court believes that decision to be erroneous, the reasons for such belief should be stated. The present decision instead of settling the question on the only basis permissible under the Bankruptcy Act, has, by accepting the ill-considered and untenable position of one or two District Courts, thrown the whole matter into confusion.

The Court further suggests that irrespective of the bankrupt's rights in the premises, Mrs. Mayhew, the wife, is in any event entitled to claim the exemption. What has just been said we think effectively answers this suggestion. The property stood in the name of the bankrupt and was his own separate property. As such it became one of the assets of the bankruptcy estate. Undoubtedly, Mrs. Mayhew, under the state statutes, could have filed a declaration of homestead on the property prior to adjudication, and by so doing have created the exemption right in the bankrupt. But we know of no case that permits a wife to claim an exemption on behalf of the bankrupt where that exemption did not, either by reason of his act or her act, exist



prior to the date of adjudication. The case of *In re Maxson*, 170 Fed. 356, does not support the Court's position in this regard. In the first place, the Court in that case held that the bankrupt had virtually amended her petition and thereby had, as a matter of fact, claimed her exemption, irrespective of the claim of the husband. In the second place, the homestead right involved in that action was a *general right* and not one depending upon the performance of any statutory pre-requisites. Accordingly, the right, without question, existed at the date of adjudication. For this reason the case, while undoubtedly correct on the facts, is not in point.

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## II.

The Court holds further that the conveyance made by the bankrupt and his wife to Willard O. Wayman prior to the petition and adjudication in bankruptcy as part of a general assignment for the benefit of creditors, did not preclude them from making the subsequent claim to the exemption.

If we understand the decision of the Court aright, this conclusion was reached on the theory that since the conveyance was not made in fraud of creditors or as a preference, there was no equitable reason why they should be denied the right. If the mere *motive* that actuates the bankrupt in the conveyance is to be considered the determining factor, no good reason appears why the Court

should aid him in repudiating the voluntary subjection of his exempt property to the claims of his creditors. If he has deliberately and advisedly, in recognition of his moral obligations, turned over property which he might otherwise hold as exempt, for the benefit of his creditors, he should be required, on the plainest principles of equity, to abide by his voluntary act. We conceive, however, that the determining question is not one of "motive", but essentially and entirely one relating to the status of the title.

That the question may be definitely and clearly presented, we will assume, for the purpose of argument, that either the bankrupt or his wife, Mrs. Mayhew, had prior to both the petition and adjudication in bankruptcy, and the conveyance to Wayman, duly and regularly filed and recorded a declaration of homestead as provided by the state law. In this situation there could be no question but that at the time of the conveyance and at the time of the adjudication, there was an exemption right. What would have been the effect if the homestead so secured had been conveyed prior to the petition and adjudication in bankruptcy, either as a preference or in fraud of creditors, or as a part of the general assignment for the benefit of creditors?

Sections 67, Sub. e, and 70, of the Bankruptcy Act, provide respectively as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person ad-

judged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be *null and void*, as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, *and the same is not exempt from execution and liability for debts by the law of his domicile*, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of his creditors."

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, *except in so far as it is to property which is exempt*, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) *property transferred by him in fraud of his creditors*; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."



Section 60, Sub. b, provides as follows:

“If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be *voidable* by the trustee and he may recover the property or its value from such person.”

The only reference to a general assignment for the benefit of creditors is contained in Section 3 wherein such an assignment is enumerated as one of the acts of bankruptcy.

There are two possible constructions of Section 67e and Section 70 of the Bankruptcy Act arising from the inclusion of the italicized words. (a) It may well be held that the intent of Section 67e, in view of these words, is *to expressly permit a bankrupt to claim an exemption out of property that has been fraudulently transferred*. This construction is consistent with the express provision that such transfers are *null and void*. If null and void and no title passes, the bankrupt obviously had title at the date

of adjudication, and his exemption right, therefore, could not be affected.

In view of the fact that by Section 60b, a preferential transfer is made only *voidable*, and that such preferential transfers are not included either by way of intendment or by express terms in Secs. 67 and 70, it would seem that the right accorded to the bankrupt by those latter sections in the case of a fraudulent transfer *is denied in the case of a preferential transfer*. The same reasons are applicable to the case of a general assignment for the benefit of creditors, which likewise is only voidable (Remington on Bankruptcy, Sec. 1606, page 777, and cases cited), and is not included in the provisions of Section 67e or Section 70. In the case of transfers of these two latter kinds, therefore, it would shrdlu pun punpun logically, that the bankrupt is, by making such transfers, precluded from subsequently claiming his exemptions.

This view of the construction and bearing of the italicized words in Section 67e and Section 70 is adopted by Mr. Remington as the proper one.

“Section 67e by its express provisions sets aside fraudulent (*although not preferential*) transfers as to the bankrupt as well as to the creditors, and *permits the bankrupt to have exemptions from the property so recovered*; so the case of *In re Codington* could not lay down the correct rule as to fraudulently transferred property, *although it might do so as to property merely preferentially transferred.*”

Vol. 1, Sec. 1095, page 620.

If this construction of the sections in question is the proper one, it is obvious that the distinction made by this Court between preferential transfers and transfers in fraud of creditors on the one hand, and general assignments for the benefit of creditors on the other, is untenable. The distinction to be made is not that suggested, but between fraudulent transfers on the one hand and preferential and transfers for the benefit of creditors on the other. In the case of fraudulent transfers, by the direct provisions of the Bankruptcy Act, the bankrupt is not precluded from claiming his exemptions. In the case of a preferential transfer and transfers for the benefit of creditors, on the other hand, by the necessary application of the provisions of the Act, he is precluded.

(b) There is another possible construction, however, of Section 67e and Section 70, arising from the inclusion of the italicized words. Congress may have intended only to provide that the transfer of property in fraud of creditors where such property consisted of *both exempt and non-exempt property*, should be null and void as to the latter, but not as to the former; that the trustee could recover property so transferred, *except such as was exempt*, and that he would be vested with title as of the date of adjudication to all of the property so transferred *except such as was exempt*. This construction, and it is probably the correct one, would necessarily lead to



this result. The bankrupt, having voluntarily conveyed exempt property, cannot recover it back from his transferee, and the trustee, by reason of the fact that he is not entitled to the exempt property, is likewise precluded. In other words, *where exempt property is fraudulently transferred the property is taken out of the control of both the bankrupt and the trustee.*

If this be the proper construction of Section 67e and Section 70, it is obvious that the principle is also applicable to preferential transfers and transfers for the benefit of creditors. In these cases, as well as in the case of a fraudulent transfer, so much of the property transferred as was exempt, would necessarily be beyond the control of the trustee, since title had never vested in him, and would likewise be beyond the control of the bankrupt. This construction has, as a matter of fact, been adopted with reference to preferential transfers in several cases.

“A mortgage constituting an unlawful preference where it includes both exempt and non-exempt property, is only voidable by the trustee as to non-exempt property and remains a valid mortgage as to the exempt property.”

In re Bailey, 176 Fed. 990.

“A transfer of a homestead exemption is not a preference, since it is not subject to the demands of creditors.”

Mills v. Fisher & Co., 159 Fed. 897.

“If a part of the property transferred by the bankrupt to the bank was exempt, or the

proceeds of exempt property, under the Iowa Statute, the creditors generally would have no right thereupon, nor the trustee, to recover the same for their benefit."

Vitzthum v. Large, 162 Fed. 685.

On the second theory just discussed, upon what possible ground would a bankrupt be entitled to reclaim in bankruptcy proceedings, as exempt, property which he had theretofore transferred? It is obvious that if he is entitled to do so it cannot be on the theory "that he has no right to extend his claim over that to which he has no title except through the intervention and instrumentality of the trustee", as suggested by the Court, *for the simple reason that the trustee could not intervene or recover the exempt property by action or otherwise*. If, then, the transferee for some reason sufficient to himself, voluntarily waives his own right to the exempt property which has been transferred to him and which he can successfully, if he desires, hold as against both the bankrupt and the trustee, and transfers and surrenders it to the trustee to be administered with the assets of the bankrupt for the benefit of all the creditors, on what possible ground can the bankrupt urge any claim to it? The bankrupt has voluntarily waived all claims against it by his conveyance, and the trustee receives it, *not by virtue of the Bankruptcy Act*, but solely by reason of the voluntary act of the transferee. It

would seem that the property under such circumstances has entirely lost its character as exempt, and that the bankrupt has lost his right to claim it as such.

Under any possible construction, therefore, of Section 67e and Section 70 of the Bankruptcy Act, it is apparent that regardless of the "motive" that may have actuated the bankrupt, he has effectively precluded himself by a voluntary conveyance whether fraudulent or preferential, or as an assignment for the benefit of creditors, from subsequently claiming the property as exempt. The reason is that he has utterly transferred the title out of himself and that when it comes into the trustee's hands it comes not through the operation of the Bankruptcy Act, but through the voluntary act of the transferee. We can see no escape from this conclusion.

What has just been said has been on the assumption that the homestead right actually existed at the date of the transfer to Willard O. Wayman. When it is considered that, as a matter of fact, there had been no declaration of homestead filed at that date, and hence no homestead right, it would seem to be doubly true that the bankrupt could not thereafter *create a homestead exemption while the property was in the hands of the transferee*, and subsequently claim it when voluntarily surrendered to the trustee.



In conclusion it is submitted that the reasoning of the Court on the two fundamental questions decided by it does not bear analysis, and has no support in any of the provisions of the Bankruptcy Act. We fully appreciate that it is the desire of the Court to be as liberal as possible in the matter of granting exemptions, but this liberality should be exercised within the limits prescribed by the Bankruptcy Act. Every consideration, we submit, urges for a further and more careful consideration of the questions involved in this case.

If, for any reason, the Court feels that its position would be the same even were a rehearing granted, we would suggest that at least it be granted to the end that the questions involved may be certified to the Supreme Court for its instruction. The Federal Courts seem to be in hopeless confusion on the questions involved and the opinion of the majority in the present case is in direct conflict with the opinion of a present member of the Supreme Court. It is desirable that important and fundamental questions arising from the Bankruptcy Act should be finally determined and adjudicated to the end that the Act may have a uniform application.

Dated, San Francisco,  
November 9, 1914.

Respectfully submitted,

R. H. CROSS,  
*Attorney for Petitioner.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

R. H. CROSS,  
*Attorney for Petitioner.*





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United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

GLENN R. BOTHWELL, as Trustee in Bankruptcy  
of AMERICAN FALLS CANAL & POWER  
COMPANY, Bankrupt,

Appellant and Petitioner,

vs.

T. E. FITZGERALD and W. A. WEST,

Appellees and Respondents.

---

In the Matter of AMERICAN FALLS CANAL &  
POWER COMPANY, a Corporation, Bankrupt.

---

Transcript of Record.

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Upon Appeal from the United States District Court  
for the District of Idaho and upon Petition  
for Revision Under Section 24b of  
the Bankruptcy Act of  
July 1, 1898.

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Filed

JUL - 1 1914

E. D. Monckton,  
Clerk.



No. 2431

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United States

Circuit Court of Appeals

For the Ninth Circuit.

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GLENN R. BOTHWELL, as Trustee in Bankruptcy  
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July 1, 1898.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[Names and Addresses of Attorneys.]**

L. R. MARTINEAU, Jr., ISAAC BLAIR EVANS,  
A. L. HOPPUAGH, CHARLES C. DEY,  
Attorneys for Glenn R. Bothwell, Trustee,  
Salt Lake City, Utah.

SULLIVAN & SULLIVAN, Attorneys for Re-  
spondents,  
Boise, Idaho.

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*In the District Court of the United States for the  
District of Idaho.*

**IN BANKRUPTCY.**

In the Matter of The AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Petition [of Trustee in Bankruptcy for Order to  
Show Cause, etc.].**

The petition of Glenn R. Bothwell, as trustee in  
bankruptcy of the American Falls Canal & Power  
Company, respectfully shows to the Court:

**I.**

That on the 24th day of February, 1914, the  
American Falls Canal & Power Company, a cor-  
poration organized under and pursuant to the laws  
of the State of Utah, filed its voluntary petition in  
bankruptcy in the District Court of the United  
States for the District of Utah, wherein it prayed to  
be adjudged a bankrupt under the laws of the  
United States. That thereafter on the 27th day of



February, 1914, the United States District Court for the District of Utah made and entered its order in said matter adjudicating the said American Falls Canal & Power Company a bankrupt within the purview of said laws of the United States, and referred the estate of said bankrupt to Charles Baldwin, referee in bankruptcy of said court, for administration. That a copy of said order of adjudication and reference is hereto attached marked Exhibit "A" and made a part of this petition.

## II.

That after the reference of said matter to the said referee, said referee caused notice to creditors to be published pursuant to law and the orders of the Court, and on the 16th [1\*] day of March, 1914, a meeting of the creditors of said bankrupt was held before the said Charles Baldwin, referee in bankruptcy, at Salt Lake City, Utah, and at said meeting claims were proved and allowed by said referee, and the creditors of said bankrupt by their votes elected Glenn R. Bothwell, your petitioner, trustee in said bankruptcy matter, and upon such election the said referee duly made and entered an order appointing the said Glenn R. Bothwell trustee in said matter and fixed his bond at the sum of One Hundred Thousand (\$100,000.00) Dollars. That thereafter on said date the said Glenn R. Bothwell executed and delivered said bond and did all things that was necessary to qualify him as such trustee, and he is now the duly elected, appointed, qualified and acting trustee in the matter of the bankruptcy

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\*Page number appearing at foot of page of original certified Record.

of the said American Falls Canal & Power Company.

### III.

Your petitioner further represents that said bankrupt estate consists of real and personal property located within the States of Utah and Idaho, and is specifically described and scheduled in said original bankruptcy proceedings.

### IV.

That on the 2d day of April, 1914, one T. E. Fitzgerald and one W. A. West, as parties plaintiffs, acting by and through Spencer L. Baird and Ben W. Davis, engaged in the practice of law under the firm name of Baird & Davis, at American Falls, Idaho, and W. E. Sullivan and L. L. Sullivan, engaged in the practice of law at Boise, Idaho, under the firm name of Sullivan & Sullivan, instituted a suit in the District Court of the Fifth Judicial District in and for Power County, State of Idaho, against the said bankrupt, the American Falls Canal & Power Company, and on said date caused summons to be issued and served upon said bankrupt, and upon the same date applied to the Court for and the Court issued an order requiring said bankrupt to appear [2] before Honorable Alfred Budge, at American Falls, Idaho, on the 11th day of April, 1914, and show cause, if any it has, why an order should not be made and entered by said Court appointing a receiver of said defendant company, with power to complete a certain lateral to said American Falls Canal, and to collect sufficient moneys due and owing said bankrupt, or to become due and owing from the holders



of water deeds of said bankrupt, and to expend the same in the completion of said canal and said lateral. That a copy of said complaint, summons and order to show cause is hereto attached, marked Exhibit "B," and made a part of this petition.

V.

Your petitioner further represents that by said proceeding the said T. E. Fitzgerald and W. A. West are attempting to secure preferences and advantages over other creditors of said corporation and to compel the application and use of the assets of said estate for their own special benefit and advantage, and greatly to the annoyance of your petitioner and to the damage of other creditors, contrary to the provisions of the said bankruptcy law, and that it would be advisable and to the advantage of said estate that some suitable person be appointed ancillary trustee by this Court to act for and in connection with your petitioner in the administration of said estate.

WHEREFORE, your petitioner prays:

1. For an order requiring the said T. E. Fitzgerald and W. A. West, and Spencer L. Baird, and Ben W. Davis, and W. E. Sullivan and L. L. Sullivan, as attorneys for the said T. E. Fitzgerald and W. A. West, plaintiffs in said proceeding, to appear before this Court at a time certain to be designated by the Court, and show cause, if any they have, why they should not be permanently enjoined from instituting any proceeding in [3] any state court of said State of Idaho against your petitioner or the said American Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering



with the possession or disposition of the assets of said bankrupt, and in the meantime and until said order can be heard, your petitioner prays for an order enjoining and restraining the said T. E. Fitzgerald and W. A. West, and each and all of their said attorneys, from appearing before the said Honorable Alfred Budge on the said 11th day of April, 1914, or at any other time or before any other Judge or court in the said State of Idaho, excepting only this court, and applying for or prosecuting said order or any other order to show cause, and from making said application or any other application for the appointment of a receiver of said bankrupt corporation, or from interfering with the possession, use or disposition of any of the assets of said bankrupt corporation.

2. Your petitioner prays that upon final hearing of said order the Court designate and appoint some proper and suitable person as ancillary trustee in the matter of the bankruptcy of said American Falls Canal & Power Company, with full power and authority to act under and in connection with your petitioner in the collection and distribution of the assets of said bankrupt corporation and the administration of said estate, pursuant to law and the orders of the District Court of the United States for the District of Utah, and of this court.

3. Your petitioner prays for general relief, including costs herein.

J. D. SHEEN,  
L. R. MARTINEAU,  
J. H. EVANS,

Solicitors for Petitioner, Salt Lake City, Utah. [4]

State of Utah,  
County of Salt Lake,—ss.

Glenn R. Bothwell, being first duly sworn, deposes and says, that he is the person named as petitioner in the foregoing petition; that he has read said petition, knows the contents thereof and that the same is true.

GLENN R. BOTHWELL.

Subscribed and sworn to before me, this 10th day of April, 1914.

[Notarial Seal]

WM. J. COWAN,  
Notary Public. [5]

**Exhibit "A" [to Petition of Trustee in Bankruptcy  
for Order to Show Cause, etc.].**

EXHIBIT "A."

*In the District Court of the United States for the  
District of Utah.*

No. 1763—IN BANKRUPTCY.

In the Matter of AMERICAN FALLS CANAL  
AND POWER COMPANY,  
Bankrupt.

**Adjudication of Bankruptcy.**

At Salt Lake City, in said District, on the 27th day of February, A. D. 1914, before the Honorable John A. Marshall, Judge of the said Court, in Bankruptcy, the petition of American Falls Canal and Power Company, that it be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard

and duly considered, the said American Falls Canal and Power Company is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable JOHN A. MARSHALL, Judge of said Court, and the seal thereof, at Salt Lake City, in said District, on the 27th day of February, A. D. 1914.

[Seal] JERROLD R. LETCHER,  
Clerk.

Enter:

J. A. MARSHALL,  
Judge.

Filed February 27, 1914. Jerrold R. Letcher,  
Clerk. [6]

*In the District Court of the United States for the  
District of Utah.*

No. 1763—IN BANKRUPTCY.

In the Matter of AMERICAN FALLS CANAL  
AND POWER COMPANY,  
Bankrupt.

### **Order of Reference.**

WHEREAS, American Falls Canal and Power Company of Salt Lake City, in the County of Salt Lake and District aforesaid, on the 27th day of February, A. D. 1914, was duly adjudged a bankrupt upon a petition filed in this court by it on the 24th day of February, A. D. 1914, according to the provisions of the acts of Congress relating to bankruptcy:

It is thereupon ordered, that said matter be referred to Charles Baldwin, one of the referees in



bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said American Falls Canal and Power Company shall attend before said referee at 10 o'clock A. M. on the 2d day of March, 1914, at his office in Salt Lake City, Utah, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said voluntary bankruptcy.

Witness the Honorable JOHN A. MARSHALL, Judge of said Court, and the seal thereof, at Salt Lake City, in said District, on the 27th day of February, A. D. 1914.

[Seal]

JERROLD R. LETCHER,

Clerk.

Enter:

J. A. MARSHALL,

Judge.

Filed February 27, 1914. Jerrold R. Letcher, Clerk. [7]

United States of America,  
District of Utah,—ss.

I, Jerrold R. Letcher, Clerk of the United States District Court, in and for the District of Utah, sitting at Salt Lake City, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the orders of adjudication and reference made by the Court February 27, 1914, and now of record in said Court, and in a certain cause No. 1763 in bankruptcy said Court pending, In the Matter of American Falls Canal and Power Company, Voluntary Bankrupt, as fully and com-

pletely as the same still remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Salt Lake City, in said District, this 10th day of March, A. D. 1914.

[Seal]

JERROLD R. LETCHER,

Clerk. [8]

**Exhibit "B" [to Petition of Trustee in Bankruptcy for Order to Show Cause, etc.].**

EXHIBIT "B."

COPY.

*In the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County.*

T. E. FITZGERALD and W. A. WEST,

Plaintiffs,

vs.

AMERICAN FALLS CANAL & POWER COMPANY, a Corporation,

Defendant.

**Order to Show Cause Why Receiver Should not be Appointed.**

The plaintiffs in the above-entitled cause, having commenced an action in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, against the defendant, American Falls Canal & Power Company, and having prayed for the appointment of a *receiver and* irrigation system situate in Bingham and Power Counties, Idaho, in said complaint in said action, duly verified

on the oath of one of the attorneys for said plaintiffs, and it satisfactorily appearing to me therefrom that there are sufficient grounds for granting an order to show cause why a receiver should not be appointed as prayed for;

IT IS THEREFORE ORDERED, That said defendant, American Falls Canal & Power Company, appear before me at the courtroom of said court in American Falls, Idaho, on the 11th day of April, 1914, at 10 o'clock A. M. of said day, to show cause, if any it has, why an order should not be made and entered by this Court appointing a receiver of said defendant company with power to complete the canal and irrigation system of said defendant company, especially its lateral No. 33, situate in Bingham and Power Counties, Idaho, and that full power to collect sufficient monies due and [9] owing, or to become due and owing from the holders of water deeds from said defendant company and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33.

Dated this 6th day of April, 1914.

ALFRED BUDGE,  
District Judge. [10]



*In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for Power County.*

T. E. FITZGERALD and W. A. WEST,

Plaintiffs,

vs.

AMERICAN FALLS CANAL & POWER COM-  
PANY, a Corporation,

Defendant.

**Summons [in State Court in Fitzgerald et al. vs.  
American Falls Co.].**

THE STATE OF IDAHO Sends Greeting to  
American Falls Canal & Power Company, the  
Above-named Defendant:

You are hereby notified that a complaint has been filed against you in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, by the above-named plaintiffs, and you are hereby directed to appear and answer the said complaint within twenty days of the service of this summons if served within said Judicial District, and within forty days if served elsewhere; and you are further notified that unless you so appear and answer said complaint within the time herein specified, the plaintiffs will take judgment against you as prayed in said complaint.

WITNESS MY HAND AND THE SEAL of  
said District Court this 6th day of April, 1914.

[Seal]

PAUL BULFINCH,  
Clerk.

\_\_\_\_\_,  
Deputy.

BAIRD & DAVIS,

Residence, American Falls, Idaho,

SULLIVAN & SULLIVAN,

Residence, Boise, Idaho,

Attorneys for Plaintiffs. [11]

**Complaint [in State Court in Fitzgerald et al. vs.  
American Falls Co.].**

District Court, Fifth Judicial District, Power  
County, State of Idaho. T. E. Fitzgerald and W. A.  
West, Plaintiffs, vs. American Falls Canal & Power  
Company, a Corporation, Defendant. Complaint.  
Filed April 6th, 1914, at 9:10 o'clock, A. M. Paul  
Bulfinch, Clerk. By \_\_\_\_\_, Deputy. Baird &  
Davis, Residence: American Falls, Idaho; Sullivan  
& Sullivan, Residence, Boise, Idaho, Attorneys for  
Plaintiffs. [12]

*In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for Power County.*

T. E. FITZGERALD and W. A. WEST,  
Plaintiffs,

vs.

AMERICAN FALLS CANAL & POWER COM-  
PANY, a Corporation,

Defendants.

### **Complaint.**

The plaintiffs complain of the defendant, and for cause of action herein allege:

#### **I.**

That the defendant, American Falls Canal & Power Company, is now, and during all the times hereinafter mentioned, has been a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business in the State of Idaho, with its principal place of business therein in Bingham County, Idaho.

#### **II.**

That said defendant is a public service or a *quasi*-public corporation, and was organized for the purpose of constructing and building that certain irrigation project and system known as the American Falls Canal & Power Company Project, situate in Bingham and Power (formerly a portion of Blaine and other counties) Counties, State of Idaho, by constructing or causing to be constructed, dams, ditches, conduits, flumes and other means for the purpose of diverting water from Snake River, and for the purpose of selling and transferring water rights therein for irrigation of lands lying under said system and for domestic purposes. [13]

#### **III.**

That on the 8th day of December, 1906, for and in consideration of the sum of \$4,000.00 to be paid in ten installments, receipt of the first of which, a cash payment of \$480.00, being thereby acknowledged, the said American Falls Canal & Power Company



made, executed and delivered to plaintiff, T. E. Fitzgerald, its certain warranty deed in writing, conveying a certain water right, a copy of which is hereto attached, marked Exhibit "A," and by this reference made a part hereof; and said complainant is now the owner and holder thereof.

#### IV.

That on the 8th day of December, 1906, for and in consideration of the sum of \$4,000.00 to be paid in ten installments, receipt of the first of which, a cash payment of \$480.00, being thereby acknowledged, the said American Falls Canal & Power Company made, executed and delivered to plaintiff, W. A. West, its certain warranty deed in writing, conveying a certain water right, a copy of which is hereto attached, marked Exhibit "B," and by this reference made a part hereof; and said complainant is now the owner and holder thereof.

#### V.

That the lands of said W. A. West, which are now owned by and in the possession of said West, described in said deed, to which the shares of water conveyed in said deed became attached and appurtenant adjoins the lands described in said deed executed and delivered to said T. E. Fitzgerald, which lands are now owned by and in the possession of said Fitzgerald, and to which the shares of water conveyed in his said deed became attached and appurtenant.

[14]

#### VI.

That said defendant, after its organization as aforesaid, proceeded to construct and build its said canal and irrigation system for the purpose of sup-

plying and delivering water for the irrigation of lands situate in Bingham and Blaine (a portion of which is now a portion of Power County) Counties, including the lands of plaintiffs herein; but the same is not, nor ever has been, constructed or completed so as to carry and deliver water of said system for the irrigation of the lands of said plaintiffs, or any portion thereof, as required by the deeds aforesaid; that sufficient water is not available under the present works as completed at the present time, to furnish the contract holders under said system who are to take their water from lateral No. 33, with sufficient water to properly irrigate their lands.

## VII.

That notwithstanding the said deeds and the obligations assumed by, and devolving upon said defendant thereunder to carry, furnish, and deliver ample water for the proper irrigation of the lands of said plaintiffs, although there was plenty of water available at the place of diversion, and notwithstanding the fact that each of said plaintiffs had duly and fully performed all the conditions and obligations of said deeds to be by said plaintiffs performed, utterly failed, neglected and refused, and still fails, neglects and refuses to construct and complete its said system so as to furnish, carry, deliver and make available for each of said plaintiffs' use, ample water, or any water for the proper irrigation of the lands of said plaintiffs or any portion thereof, or crops and trees planted and growing thereon, in accordance with each of said deeds; said defendant has utterly failed, neglected and refused and still fails, neglects



and refuses to construct canals and laterals of a carrying capacity [15] sufficient to deliver water at the rate of one-eightieth of one second-foot per acre at its main canal, and one-fiftieth of one second-foot per acre, or any water, in the lateral from which said plaintiffs were to take water for the irrigation of their said lands, but, on the contrary, said defendant constructed its said canals and laterals and carried and delivered some water, not sufficient, however, to properly irrigate any of said lands, to a point within one-half mile of said land of said T. E. Fitzgerald, but said point was at too low an elevation to allow water to be distributed therefrom over said lands of said plaintiffs, or any part thereof, thus making all of the canal system of said defendant under and below the said lands of said plaintiffs so as to make it impossible to secure water therefrom at any point within one-half mile of said lands, for the irrigation thereof; and did utterly fail, neglect and refuse and still fails, neglects and refuses, to so locate and construct its said irrigation system in such a manner, and in such capacity that ample water for the irrigation of said lands of said plaintiffs and the crops and trees growing thereon, can or could be carried or furnished or delivered or made available for use on said lands of said plaintiffs or any part thereof, during all of said irrigation seasons, or any part thereof, in accordance with its obligations under said deeds, but, on the contrary, constructed the canals and laterals of said system, and especially the lateral leading to the lands of said plaintiffs from which they were to take water for



their said lands, in such a manner that said lateral and all points of the same within one-half mile of any of said lands is below the point where it is necessary for said plaintiff to take the water from said lateral for distribution and was upon the said lands of said plaintiffs and each part of the same, thus making all of said lateral over a course and grade that is too low to [16] permit of the distribution of water therefrom over and upon said lands or any part thereof. By reason of so constructing its said canals and laterals, said plaintiffs found, and still find, it impossible to take or distribute water therefrom over their said lands, or any part thereof, for irrigation purposes, or any purposes; that said defendant company with the full knowledge at all times of said conditions, failed and refused, and still fails and refuses to remedy the defects in the lateral locations and construction, and still fails, neglects and refuses to relocate or reconstruct or complete said laterals and said system, or remedy in any way the defective and improperly located and constructed parts of the canal and irrigation system aforesaid; whereby each of said plaintiffs has been, since the execution of their said deeds, and still is, deprived of the water supply to which he is entitled for his said land as aforesaid.

#### VIII.

That said defendant notified each of said plaintiffs herein prior to the construction of the lateral leading to the lands of said plaintiffs that it would construct and built a lateral to be known as No. 33, from which it would expect each of said plaintiffs

and other water-right holders having lands lying under the same to take water therefrom for the irrigation of their lands; which said lateral No. 33 is the one constructed as set forth in Paragraph VII herein; that said defendant informed and notified each of the plaintiffs herein that it would construct said lateral of sufficient elevation and to a certain point near the west side-line of the land of said T. E. Fitzgerald and with the understanding between said defendant and the plaintiffs herein that they would then construct a common [17] lateral for a certain distance across the land of said Fitzgerald and then said West could make connections therewith with a lateral leading to his land for the irrigation thereof; that this arrangement was made and agreed upon by reason of the location of the lands of the plaintiffs herein, the same being adjoining and contiguous.

#### IX.

That during the year 1909, said plaintiffs, at great expense, constructed the necessary laterals, ditches, flumes, and gates leading from the point aforesaid at which they were to connect with the said defendant company irrigation system to and over said lands of said plaintiffs for taking and distributing water thereon and said plaintiffs were ready, willing and fully prepared, and said ditches and flumes of said plaintiffs were properly located, constructed and of sufficient capacity to receive and distribute the water they were entitled to under said deeds upon their said lands for the irrigation thereof.



## X.

That the boundaries of the lands of each of said plaintiffs and all of the same lie under the canals, laterals, etc., making up said irrigation system of the defendant and is now, and has been, during all the times mentioned herein, susceptible of irrigation under said system; that said tracts of land are dry and arid in character and require the artificial use of water thereon before crops of any kind can be successfully raised; that there is no water of any kind available or obtainable on or near said lands, which can be utilized for irrigation, cultivation, reclamation or other purposes on said land, other than through said irrigation system, nor has there been during any of the times mentioned herein, all of which said defendant company at all times well knew. [18]

## XI.

That said defendant corporation is insolvent in law and in fact and unable to pay its debts or meet its current obligations as they become due, and is without means to complete said system, especially said lateral No. 33, so as to deliver water to each of these plaintiffs in accordance with their said deeds; that there are no assets of said defendant company available for the completion of said system, especially said lateral No. 33, except the amounts remaining unpaid on the deferred payments of deeds executed by said company to purchasers of water rights under said system and that there are a large number of said deferred payments still remaining unpaid, amounting to many thousands of dollars and more than sufficient to complete said system and especially



said lateral No. 33, the completion of which will not exceed the sum of \$2,500.00.

## XII.

That said plaintiff, T. E. Fitzgerald, has made three payments on his deed, amounting to the sum of \$1,638.72, and the said plaintiff, W. A. West, has made the first payment on his said deed, amounting to the sum of \$480.00; that in accordance with the terms of their said contract, the plaintiffs herein, and each of them, still owe to the defendant corporation the balance of the purchase price on the water right and water shares conveyed therein; that otherwise each of said plaintiffs has at all times since the execution of said deeds, fully performed each and every condition and obligation to be by him performed under his said deed or otherwise due to said company from each of said plaintiffs; that each of said plaintiffs has failed, and refused to pay the other deferred payments and interest on his said contract, for the reason that said defendant has failed and refused and neglected to complete said system, especially said lateral No. 33, and because the said defendant still fails and [19] refuses to place said system in a condition to deliver water to each of said plaintiffs for the year 1914, or at all, for the irrigation of its said lands or any part thereof; that each of said plaintiffs is ready and willing to keep and perform the terms and conditions of said deed in all things to be kept and performed by him whenever the defendant corporation is compelled by this Court to perform the terms and conditions of said deeds on its part.

## XIII.

That said plaintiffs are jointly interested in and are joint owners with the other water-users of the said irrigation system, and they are entitled to have all deferred payments still remaining unpaid and the proceeds of both principal and interest received under and by virtue of all deeds and all moneys due and owing thereon and upon which any deferred payments or balances are due, applied upon the completion of said irrigation system, and these defendants are especially entitled to have sufficient thereof applied to the completion of said lateral No. 33, and to the performance of all other terms and conditions of said deeds of said plaintiffs to be kept and performed by said defendant corporation.

## XIV.

That each of said plaintiffs has cultivated and improved large portions of their said lands at great expense and labor and have been unable to secure water under their said deeds for the irrigation thereof; that each of said plaintiffs has, during past irrigation seasons, suffered great damage and loss amounting to many thousand dollars, by reason of the destruction of their crops and trees planted on their said lands by reason of the failure to receive water under their said deeds and to have said lateral No. 33 completed as aforesaid; that they will be [20] in great need of water for the irrigation season of 1914 for the use on their said lands; that said defendant company does not intend to complete said system and especially said lateral No. 33, so that neither of said plaintiffs can secure water for the



irrigation of his lands under his said deed; that unless a receiver is appointed by this Court and authorized to take possession of this system and administer and complete the same, these plaintiffs, and each of them, and the other water-right holders under said system who have not received water in accordance with their water deeds, will suffer great and irreparable injury and loss.

#### XIV.

That the amounts or deferred payments due or to become due on said deeds amounted to several hundred thousand dollars; and that said American Falls Canal & Power Company has been, for several years, collecting, or causing to be collected, the deferred payments on the water deeds executed by said defendant to the settlers and water-users under said system, applying, or having applied the proceeds to its own use and benefit; that said defendants threaten to and, unless prevented by order of this Court, will continue to collect or cause to be collected any and all deferred payments or amounts unpaid on said water deeds as the same become due, and apply and appropriate said amounts so collected to the use and benefit of said defendant and thereby divert said amounts collected as aforesaid, so that the same will not be expended in the completion of said canal system as aforesaid.

#### XV.

That it is for the best interests of the plaintiffs herein and their only remedy is that a receiver be appointed for said defendant, American Falls Canal & Power Company, and authorized [21] to collect sufficient moneys due and owing or authorized to be-



come due and owing from the holders of water deeds entered into with said defendant corporation and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed.

### XVI.

That neither of said defendants has a plain, speedy and adequate remedy at law.

WHEREFORE, plaintiffs pray and demand:

#### I.

That some competent and proper person be appointed receiver by the Court, with power to complete said system and with full power to collect sufficient moneys due and owing or to become due and owing from the holders of water deeds entered into with said defendant corporation, and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed.

#### II.

For costs of suit herein and for such other and further relief as may be just and equitable in the premises.

BAIRD & DAVIS,

Residence: American Falls, Ida.,

SULLIVAN & SULLIVAN,

Residence: Boise, Idaho,

Attorneys for Plaintiffs. [22]

The State of Idaho,  
County of Ada,—ss.

W. E. Sullivan, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiffs in the above-entitled cause and makes this verification for and on behalf of said plaintiffs; that he has read the foregoing complaint, knows the contents thereof, and that he believes the facts stated therein to be true; that the reason why this verification is not made by the plaintiffs herein is because said plaintiffs are absent from Ada County, where said attorney resides; and for the further reason that the facts stated in said complaint are within the knowledge of this affiant.

W. E. SULLIVAN.

Subscribed and sworn to before me, this 2d day of April, 1914.

[Seal]

R. GARLAND DRAPER,  
Notary Public. [23]

EXHIBIT "A."

AMERICAN FALLS CANAL & POWER CO.

WARRANTY DEED.

No. 357.

THIS AGREEMENT, entered into by and between THE AMERICAN FALLS CANAL & POWER COMPANY, a corporation (hereinafter called the Company), party of the first part, and T. E. FITZGERALD of American Falls, County of Oneida, State of Idaho (hereinafter called the purchaser), party of the second part:

## WITNESSETH:

That for and in consideration of the sum of Four Thousand Dollars, to be paid to the PEOPLE'S BANK & TRUST COMPANY, a corporation, at its Bank, at Rockford, Illinois, as hereinafter specified, and in consideration of the mutual covenants and agreements in this contract contained, to be kept and performed the said parties hereby mutually covenant and agree as follows, to wit:

## I.

The Company hereby warrants and conveys to the purchaser One Hundred Sixty shares of perpetual water right out of the water appropriated by it from the Snake River in Idaho, to be used during the irrigation season, that is to say, between the 1st day of April and the 1st day of November of each year, and for each and every year hereafter; together with a proportionate interest in the irrigation works, said proportionate interest being based upon the number of shares of water right finally sold in said canal system. Each share of water shall represent a carrying capacity sufficient to deliver water at the rate of one-eightieth of one second-foot per acre in main canal, and one-fiftieth of one second-foot per acre in all laterals, limiting, however, the maximum amount of water to be furnished to purchaser during any one irrigation season to two and one-half acre-feet. [24]

## II.

The Company agrees to carry the water to which the purchaser is entitled under this conveyance through its canal system, and to measure and deliver the same at a point within one-half mile from each



legal subdivision of 160 acres.

The shares of water right herein conveyed shall attach to and become appurtenant to the following described land in Blaine Co., Idaho, to wit: West half of Northeast Quarter and Lot 1 of Section Twenty-five, Township Seven, South of Range Thirty East, and Lot Eleven of Section Nineteen, and Lots Six and Seven of Section Thirty, both in Township Seven South of Range Thirty-one East, B. M. of Section ——— Township ——— South, Range ——— East, Boise Meridian, containing One Hundred Sixty Acres.

(Plat for marking.)

### III.

For the purpose of defraying the expense of operating and maintaining said canal system, the Company shall have the right to make an annual charge against the purchaser therefor, which charge shall be made equally and ratably against all of the users of the water from said canal system. But said annual charge shall not be based upon a rate exceeding twenty cents per acre-foot for all water delivered until the full allowance of two and one-half acre-feet shall have been delivered and the rate shall not exceed fifty cents per acre-foot for all water delivered in excess thereof, but no charge shall be made for any water unless delivered at the request of purchaser, provided, however, that during the first irrigation season that purchaser is able to secure water from said canal system one-fourth of the full allowance of two and one-half acre-feet of water shall be delivered free of all charge, thereafter the rates above specified shall govern. Said annual charge

shall be due and payable [25] on the first day of November of the year for which said charge is made, and the failure of the purchaser to pay said charge within thirty days after the same becomes due, shall constitute a default for which the Company may foreclose the rights of the purchaser as provided herein, and the Company shall have the right to suspend the further delivery of water to said purchaser while such default continues.

## IV.

The purchaser agrees to pay the Company for said shares of water right, \$25.00 per acre in the manner following, to wit:

PAYMENTS.	Date Due.			Principal.		Interest.		Total Amount.	
	Month.	Day.	Year.	Dol.	Cts.	Dol.	Cts.	Dol.	Cts.
Cash	Dec.	8th,	1906	\$480.00		\$		\$	
First Deferred	Dec.	8th,	1907	320.00		211.20		531.20	
Second Deferred	Dec.	8th,	1908	400.00		192.00		592.00	
Third Deferred	Dec.	8th,	1909	400.00		168.00		568.00	
Fourth Deferred	Dec.	8th,	1910	400.00		144.00		544.00	
Fifth Deferred	Dec.	8th,	1911	400.00		120.00		520.00	
Sixth Deferred	Dec.	8th,	1912	400.00		96.00		496.00	
Seventh Deferred	Dec.	8th,	1913	400.00		72.00		472.00	
Eighth Deferred	Dec.	8th,	1914	400.00		48.00		448.00	
Ninth Deferred	Dec.	8th,	1915	400.00		24.00		424.00	

The first payment is hereby acknowledged. Deferred payments shall bear interest at the rate of six per cent per annum, payable annually. Any deferred payment paid before due shall stop the running of interest thereon.

## V.

To secure the payment to the Company of all deferred payments and the interest thereon, and any charges made to defray the expense of operating and maintaining said canal system as herein provided, said Company shall have and retain a lien on said

shares of water right, and on all the right, title and interest of purchaser [26] acquired or hereafter to be acquired in and to the land herein described, which said lien shall be in all respects prior and superior to any and all liens now, or hereafter created, or attempted to be created by said purchaser, and the same shall remain in full force and effect until all the covenants herein made by the purchaser shall have been fully performed.

#### VI.

In the case the purchaser shall fail to make the payments aforesaid, or either of them, or the interest thereon, at the times and upon the terms prescribed, or shall fail to observe and perform any of the conditions or covenants herein contained, the holder hereof may declare all subsequent payments due, and may proceed at law or in equity to foreclose all of the right, title, and interest of said purchaser in and to said shares of water right and the land herein described; or the holder hereof may, at his option proceed to sell in accordance with any statutory remedy given by law, said shares of water right and said land in satisfaction of said sums.

#### VII.

The Company shall devise and make, subject to the approval of the State Engineer and the State Board of Land Commissioners of Idaho, all needful rules and regulations governing the management and distribution of water from said canal system, not inconsistent with the laws of the United States, the laws of the State of Idaho, and the contract between the State and the Company applicable thereto, which



rules and regulations shall provide for the distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water therein. In case of shortage of water in the Company's canal, through accident, drought or scarcity in any natural stream supplying said canal, or by reason [27] of improper diversion of water by any person, or for any other cause beyond its control, the Company shall not be liable for such shortage nor for any damage caused thereby, nor shall there be, by reason thereof, any deduction from any sum herein agreed to be paid by the purchaser.

#### VIII.

It is understood and agreed by both parties hereto that the PEOPLE'S BANK & TRUST COMPANY, a corporation with its principal office at Rockford, Illinois, Trustee, is exclusively entitled to receive and acknowledge all payments made upon this contract, and to execute in behalf of the Company receipts and acquittances therefor.

#### IX.

The purchaser hereby agrees to allow the Company any rights of way through the land herein described which may be needed for the construction of the canal or any lateral. Said rights of way shall be equal to the actual width of said canal or lateral at its base, from toe to toe, together with a strip of land along one side of the canal one hundred feet in width, and a strip of land along one side of every lateral thirty feet in width, all of which strips of land may be used for an open roadway or other useful purpose.

## X.

IT IS FURTHER AGREED, that each and every of the terms and conditions herein expressed shall extend to and be binding upon the successors and assigns of the Company, and upon the heirs, legal representatives, successors or assigns of the purchaser. It is agreed between the parties hereto, that when the said purchaser shall have complied with all the conditions contained herein, and shall have completed all payments as herein provided, then this deed shall give a clear and unincumbered perpetual right to the purchaser for the [28] shares of water herein described, and thereupon the Company agrees to acknowledge the full payment and performance of purchaser, and to satisfy and discharge, in the manner provided by law, the lien herein created.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals in duplicate this 8th day of December, A. D. 1906.

(Signed) AMERICAN FALLS CANAL &  
POWER COMPANY.

By F. A. SWEET,

Vice-president.

[Corporate Seal]

J. R. SHRECK,

Secretary.

T. E. FITZGERALD,

Purchaser.

Signed, sealed and delivered by said Corporation  
in the presence of

NORA M. JONES,

Witnesses.

Grantee's Duplicate Deed.

State of Idaho,  
County of Bannock,—ss.

On this 4th day of March, in the year 1907, before me, Nora M. Jones, a Notary Public in and for the County of Bannock, State of Idaho, personally appeared J. R. Shreck, known to me to be the Secretary of the corporation that executed the instrument, and acknowledged to me that such corporation executed the same.

[Notarial Seal]

NORA M. JONES,  
Notary Public. [29]

EXHIBIT "B."

AMERICAN FALLS CANAL & POWER CO.

WARRANTY DEED.

No. 358.

THIS AGREEMENT, entered into by and between THE AMERICAN FALLS CANAL & POWER COMPANY, a corporation (hereinafter called the Company), party of the first part, and W. A. WEST of American Falls, County of Oneida, State of Idaho (hereinafter called the purchaser), party of the second part,

WITNESSETH:

That for and in consideration of the sum of Four Thousand Dollars, to be paid to the PEOPLE'S BANK & TRUST COMPANY, a corporation, at its Bank, at Rockford, Illinois, as hereinafter specified, and in consideration of the mutual covenants and agreements in this contract contained, to be kept and performed the said parties hereby mutually covenant and agree as follows, to wit:



## I.

The Company hereby warrants and conveys to the purchaser One Hundred Sixty shares of perpetual water right out of the water appropriated by it from the Snake River in Idaho, to be used during the irrigation season, that is to say, between the 1st day of April and the 1st day of November of each year, and for each and every year hereafter; together with a proportionate interest being based upon the number of shares of water right finally sold in said canal system. Each share of water right shall represent a carrying capacity sufficient to deliver water at the rate of one-eightieth of one second-foot per acre in main canal, and one-fiftieth of one second-foot per acre in all laterals, limiting, however, the maximum amount of water to be furnished to purchaser during any one irrigation season to two and one-half acre-feet. [30]

## II.

The Company agrees to carry the water to which the purchaser is entitled under this conveyance through its canal system, and to measure and deliver the same at a point within one-half mile from each legal subdivision of 160 acres.

The shares of water right herein conveyed shall attach to and become appurtenant to the following described land in Blaine County, Idaho, to wit:

The West Half of Southeast Quarter and Lots Two, Three, and Four of Section Twenty-five, Township Seven, (7) South, Range 30 East, Boise Meridian, containing One Hundred Sixty acres.

(Plat for marking.)

## III.

For the purpose of defraying the expense of operating and maintaining said canal system, the Company shall have the right to make an annual charge against the purchaser therefor, which charge shall be made equally and ratably against all of the users of the water from said canal system. But said annual charge shall not be based upon a rate exceeding twenty cents per acre-foot for all water delivered until the full allowance of two and one-half acre-feet shall have been delivered, and the rate shall not exceed fifty cents per acre-foot for all water delivered in excess thereof, but no charge shall be made for any water unless delivered at the request of purchaser, provided, however, that during the first irrigation season that purchaser is able to secure water from said canal system one-fourth of the full allowance of two and one-half acre-feet of water shall be delivered free of all charge, thereafter the rates above specified shall govern. Said annual charge shall be due and payable on the first day of November of the year for which said charge is made, and the failure of the purchaser to pay said charge within thirty days after the same becomes due, shall constitute a default for which the Company may foreclose the [31] rights of the purchaser as provided herein, and the Company shall have the right to suspend the further delivery of water to said purchaser while such default continues.

## IV.

The purchaser agrees to pay the Company for said

shares of water right, \$25.00 per share in the manner following, to wit:

PAYMENTS.	Date Due.			Principal.		Interest,		Total Amount.	
	Month.	Day.	Year.	Doll.	Cts.	Doll.	Cts.	Doll.	Cts.
Cash	Dec.	8th,	1906	\$480.00		\$		\$	
First Deferred	Dec.	8th,	1907	320.00		211.20		531.00	
Second Deferred	Dec.	8th,	1908	400.00		192.00		592.00	
Third Deferred	Dec.	8th,	1909	400.00		168.00		568.00	
Fourth Deferred	Dec.	8th,	1910	400.00		144.00		544.00	
Fifth Deferred	Dec.	8th,	1911	400.00		120.00		520.00	
Sixth Deferred	Dec.	8th,	1912	400.00		96.00		496.00	
Seventh Deferred	Dec.	8th,	1913	400.00		72.00		472.00	
Eighth Deferred	Dec.	8th,	1914	400.00		48.00		448.00	
Ninth Deferred	Dec.	8th,	1915	400.00		24.00		424.00	

The first payment is hereby acknowledged. Deferred payments shall bear interest at the rate of six per cent per annum, payable annually. Any deferred payment paid before due shall stop the running of interest thereon.

#### V.

To secure the payment to the Company of all deferred payments and the interest thereon, and any charges made to defray the expense of operating and maintaining said canal system as herein provided, said Company shall have and retain a lien on said shares of water right, and on all the right, title and interest of purchaser acquired or hereafter to be acquired in and to the land herein described, which said lien shall be in all respects prior and superior to any and all liens now, or hereafter created, or attempted to be [32] created by said purchaser, and the same shall remain in full force and effect until all the covenants herein made by the purchaser shall have been fully performed.

#### VI.

In case the purchaser shall fail to make the pay-



ments aforesaid, or either of them, or the interest thereon, at the times and upon the terms prescribed, or shall fail to observe and perform any of the conditions or covenants herein contained, the holder hereof may declare all subsequent payments due, and may proceed at law or in equity to foreclose all of the right, title, and interest of said purchaser in and to said shares of water right and the land herein described; or the holder hereof may, at his option proceed to sell in accordance with any statutory remedy given by law, said shares of water right and said land in satisfaction of said sums.

## VII.

The Company shall devise and make, subject to the approval of the State Engineer and the State Board of Land Commissioners of Idaho, all needful rules and regulations governing the management and distribution of water from said canal system, not inconsistent with the laws of the United States, the laws of the State of Idaho, and the contract between the State and the Company applicable thereto, which rules and regulations shall provide for the distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water therein. In case of shortage of water in the Company's canal, through accident, drought or scarcity in any natural stream supplying said canal, or by reason of improper diversion of water by any person, or for any other cause beyond its control, the Company shall not be liable for such shortage nor for any damage caused [33] thereby, nor shall there be, by reason thereof, any deduction

from any sum herein agreed to be paid by the purchaser.

### VIII.

It is understood and agreed by both parties hereto that the PEOPLE'S BANK & TRUST COMPANY, a corporation with its principal office at Rockford, Illinois, Trustee, is exclusively entitled to receive and acknowledge all payments made upon this contract, and to execute in behalf of the Company receipts and acquittances therefor.

### IX.

The purchaser hereby agrees to allow the Company any rights of way through the land herein described which may be needed for the construction of the canal or any lateral. Said rights of way shall be equal to the actual width of said canal or lateral at its base, from toe to toe, together with a strip of land along one side of the canal one hundred feet in width, and a strip of land alongside of every lateral thirty feet in width, all of which strips of land may be used for an open roadway or other useful purpose.

### X.

IT IS FURTHER AGREED, that each and every of the terms and conditions herein expressed shall extend to and be binding upon the successors and assigns of the Company, and upon the heirs, legal representatives, successors or assigns of the purchaser. It is agreed between the parties hereto, that when the said purchaser shall have complied with all the conditions contained herein, and shall have completed all payments as herein provided, then this deed shall give a clear and unincumbered perpetual

right to the purchaser for the shares of water herein described, and thereupon the [34] Company agrees to acknowledge the full payment and performance of purchaser, and to satisfy and discharge, in the manner provided by law, the lien herein created.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals in duplicate this 8th day of December, A. D. 1906.

(Signed) AMERICAN FALLS CANAL &  
POWER COMPANY.

By F. A. SWEET,  
Vice-President.

J. R. SHRECK,  
Secretary.

[Corporate Seal]

W. A. WEST,  
Purchaser.

Signed, sealed and delivered by said Corporation in the presence of

NORA M. JONES,  
Witnesses.

Copy for State of Idaho.

State of Idaho,

County of Bannock,—ss.

On this 7th day of March, in the year 1907, before me, Nora M. Jones, a Notary Public in and for the County of Bannock, State of Idaho, personally appeared J. R. Shreck, known to me to be the Secretary of the corporation that executed the instrument, and acknowledged to me that such corporation executed the same.

[Notarial Seal]

NORA M. JONES,  
Notary Public. [35]



United States of America,  
District of Utah,—ss.

I, Jerrold R. Letcher, Clerk of the United States District Court for the District of Utah, do hereby certify that Charles Baldwin is the Referee in Bankruptcy of this Court for Salt Lake County, Utah, that he has filed in my office the bond of the trustee in bankruptcy in the Matter of American Falls Canal and Power Company, Voluntary Bankrupt, in which it appears that said trustee, Glenn R. Bothwell, was duly appointed as such trustee on the 16th day of March, 1914, and gave bond for the sum of \$100,000, with sureties approved by said referee, same being F. A. Sweet and R. E. McConaughy. I further certify that orders of adjudication of bankruptcy of said American Falls Canal & Power Company, and reference to Charles Baldwin, as referee in this cause, were made on the 27th day of February, 1914.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Salt Lake City, in said District this 10th day of April, A. D. 1914.

[Seal] JERROLD R. LETCHER,  
Clerk United States District Court for the District  
of Utah.

[Endorsed]: Filed April 13th, 1914. A. L. Richardson, Clerk. [36]

*In the District Court of the United States for the  
District of Idaho.*

**IN BANKRUPTCY.**

**In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.**

**Order to Show Cause.**

It appearing to the Court from the petition of Glenn R. Bothwell, as trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, that the said American Falls Canal & Power Company was on the 24th day of February, 1914, by the District Court of the United States for the District of Utah, duly adjudicated a bankrupt, and that such proceedings were thereafter had that the said Glenn R. Bothwell became and now is the duly appointed, qualified and acting trustee of said bankrupt. And it further appearing to the Court that said bankrupt estate consists of real and personal property located in Utah and Idaho, and that on the 2d day of April, 1914, one T. E. Fitzgerald and one W. A. West, acting by and through Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, instituted a proceeding in the District Court for Power County, State of Idaho, and are seeking to secure the appointment of a receiver to take possession of the assets of said bankrupt:

NOW, THEREFORE, upon motion of J. D. Skeen, one of the solicitors for the petitioner, it is ordered that the said T. E. Fitzgerald and W. A. West, and

Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, their attorneys, appear [37] before this court at Boise, on the 17th day of April, 1914, at 10 o'clock A. M., and show cause, if any they have, why they should not be enjoined and restrained from further prosecuting said action wherein T. E. Fitzgerald and W. A. West are plaintiffs and the American Falls Canal & Power Company, a corporation, is defendant, and from presenting said order to show cause or otherwise applying to said court or any other court in the State of Idaho for an order appointing a receiver of said American Falls Canal & Power Company, or of any of its property located in the State of Idaho or elsewhere, or from directly or indirectly taking or attempting to take possession of any of the real or personal property or assets of said American Falls Canal & Power Company, or from causing or seeking to cause any other person or corporation to take possession of said property or assets, or otherwise interfering with the administration of the assets of said corporation or the possession, use or disposition of its property.

And it is further ordered that until said matter can be heard on said 17th day of April, 1914, or any other date to which it might be by this Court continued, it is ordered that the said T. E. Fitzgerald, and W. A. West and Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, their attorneys, be and they are hereby enjoined and restrained from doing or attempting to do any of the things hereinabove specified.

Provided, however, that this order shall not take



effect until the said Glenn R. Bothwell, as such petitioner, shall have executed and delivered to the clerk of this court a good and sufficient undertaking in the penal sum of Twenty-five Hundred [38] (\$2,500.00) Dollars.

Dated this 13th day of April, 1914.

FRANK S. DIETRICH,  
Judge.

Service of a copy of the foregoing order admitted this 13th day of April, 1914.

SULLIVAN & SULLIVAN,  
Attys. for West and Fitzgerald.

[Endorsed]: Filed April 13, 1914. A. L. Richardson, Clerk. [39]

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**Trustee's Bond.**

THE AETNA ACCIDENT AND LIABILITY COMPANY, HARTFORD, CONNECTICUT.

MORGAN G. BULKELEY, PRESIDENT.

*In the District Court of the United States for the  
District of Idaho.*

IN BANKRUPTCY.

In the Matter of the AMERICAN FALLS  
CANAL & POWER COMPANY, a Corporation,

Bankrupt.

**UNDERTAKING.**

Glenn R. Bothwell, as trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, having made application to this Court for

an order enjoining and restraining T. E. Fitzgerald, and W. A. West, and Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, their attorneys, from prosecuting a certain action in the District Court for Power County, State of Idaho, and the Court having made said order conditioned upon the execution and delivery to the clerk of this court, for the use of the parties so enjoined, of an undertaking in the penal sum of Twenty-five Hundred (\$2500.00) Dollars:

NOW, THEREFORE, pursuant to said proceedings and in consideration of the execution of said order, we, the undersigned, The Aetna Accident and Liability Company, a corporation of the State of Connecticut and licensed to become sole surety on bonds in the State of Idaho, undertake and agree on behalf of said Glenn R. Bothwell to pay to the clerk of the court, for the use and benefit of the said T. E. Fitzgerald and W. A. West and Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, their attorneys, of all damages that they may sustain by reason of the issuance of said restraining order, if finally determined that said order was erroneously or wrongfully issued, not exceeding, however, the sum of Twenty-five Hundred (\$2500.00) Dollars.

IN WITNESS WHEREOF, we have hereunto set our hands this 10th day of April, A. D. 1914.

THE AETNA ACCIDENT AND LIABILITY  
COMPANY,

By B. F. GROWEG,  
Resident Vice-President.

Attest: JNO. T. BRUNN, [Seal]  
Resident Assistant Secretary.

Countersigned:

THE AETNA ACCIDENT & LIABILITY  
CO.

By H. K. SEAL,  
Res. V. P.

H. K. SEAL,  
For Pettengill, Perrault & Rossi,  
Resident Agent. [40]

State of Utah,  
County of Salt Lake,—ss.

On this 10th day of April, 1914, before me personally came B. F. Groweg, to me known, who, being by me duly sworn, did depose and say: That she resides in the City of Salt Lake; that she is Resident Vice-President of The Aetna Accident and Liability Company, the corporation described in, and which executed the within instrument; that she knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that she is acquainted with Jno. T. Brunn; that she knows him to be the Resident Assistant Secretary of said company; that the signature of said Jno. T. Brunn, subscribed to said instrument, is in the genuine handwriting of said Jno. T. Brunn, and was thereto sub-



scribed by like order of said Board of Directors, and in the presence of him, the said B. F. Groweg.

E. CEEPTON,  
Notary Public.

My Commission expires 12-5-16.

At a regular meeting of the Board of Directors of The Aetna Accident and Liability Company, duly called and held on the 28th day of December, A. D. 1911, the following By-Law was adopted:

**ARTICLE 8, RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS.**

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it. Such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

Section 3. Resident Assistant Secretaries may,

subject to the provisions and limits named in their certificate of authority, fix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and *other obligatory* in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

Section 4. *Attorneys-in-Fact* may, subject to the provisions and limits named in their certificate of authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact when attested by any other Attorney-in-Fact shall be as binding upon the Company as if signed, sealed and attested by any Officer of the Company. [41]

State of Connecticut,  
County of Hartford,—ss.

I, Norman C. Stevens, of the Aetna Accident and Liability Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company,  
at Hartford, Conn., this 11th day of February, 1914.

[Seal]

NORMAN C. STEVENS,

Secretary.

THE AETNA ACCIDENT AND LIABILITY  
COMPANY, HARTFORD, CONNECTICUT.

CERTIFICATE OF AUTHORITY OF RESIDENT  
VICE-PRESIDENT.

KNOW ALL MEN BY THESE PRESENTS, THAT B. F. Groweg, has been and is hereby appointed Resident Vice-President of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Salt Lake City, Utah, and as such Resident Vice-President has full power and authority to sign and execute, on behalf of The Aetna Accident and Liability Company, any and all bonds and undertakings, and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911:

ARTICLE 8, RESIDENT OFFICERS, ATTOR-  
NEYS-IN-FACT AND AGENTS.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any



such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 21st day of October, A. D. 1913.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

[Seal]

By J. S. ROWE,  
Secretary.

DANIELS, GEO.,

Assistant Secretary. [42]

State of Connecticut,  
County of Hartford,—ss.

On this 21st day of October, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and

which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal]

JAMES F. McEVITT,  
Notary Public.

My commission expires Jan. 31, 1914.

THE AETNA ACCIDENT AND LIABILITY  
COMPANY, HARTFORD, CONNECTICUT.

CERTIFICATE OF AUTHORITY OF RESIDENT  
SECRETARY.

KNOW ALL MEN BY THESE PRESENTS, THAT John T. Brunn, has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Salt Lake City, Utah, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings and all bonds and undertakings sealed and attested by him when signed by a duly appointed Resident Vice-President shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Company, at a meeting duly called and held on the 28th day of December, 1911.

**ARTICLE 8, RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS.**

Section 1. The President, any Vice-President or the Secretary may, from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 2. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other officer could bind it; Such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant



Secretary, this 21st day of October, A. D. 1913.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

By J. S. ROWE,  
Secretary.

[Seal]

Attest: DANIELS, G.,  
Assistant Secretary. [43]

State of Connecticut,  
County of Hartford,—ss.

On this 21st day of October, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal]

JAMES F. McEVITT,  
Notary Public.

My Commission expires Jan. 31, 1914.

Approved: April 13, 1914.

DIETRICH,  
Judge.

[Endorsed]: Filed April 13, 1914. A. L. Richardson, Clerk. [44]

*In the District Court of the United States for the  
District of Idaho, Southern Division.*

IN BANKRUPTCY.

In the Matter of the AMERICAN FALLS CANAL  
AND POWER COMPANY, a Corporation,  
Bankrupt.

**Order [Enjoining and Restraining T. E. Fitzgerald  
and W. A. West from Proceeding Further in  
Action, etc.].**

The order to show cause why T. E. Fitzgerald and W. A. West should not be enjoined from further prosecuting an action in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein T. E. Fitzgerald and W. A. West are plaintiffs and the American Falls Canal & Power Company is defendant, praying for the appointment of a receiver, coming on regularly for hearing, J. D. Skeen appearing as attorney for Glen R. Bothwell, Trustee of said Bankrupt, and W. E. Sullivan appearing as attorney for said T. E. Fitzgerald and W. A. West; and it appearing to the Court that said bankrupt was possessed of property located within the State of Idaho, and that the legal title and possession of said property was in the trustee prior to the institution of said proceeding; and it further appearing that it is the duty of the said trustee in bankruptcy to apply to the referee in bankruptcy for authority to reconstruct and rebuild a certain lateral conveying water from American Falls Canal & Power Co. system to the lands of

said T. E. Fitzgerald and W. A. West—commonly known as Lateral No. 33—so as to properly irrigate said lands: [45]

IT IS ORDERED, That said T. E. Fitzgerald and W. A. West be, and they are, hereby enjoined and restrained from proceeding further in said action in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, until further order of this Court; and

IT IS FURTHER ORDERED, That the said Glen R. Bothwell, as trustee in the Matter of the Bankruptcy of the American Falls Canal & Power Co., make application at once for authority from the said bankruptcy court within the District of Utah to reconstruct and rebuild said Lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company System to the lands owned by the said T. E. Fitzgerald and W. A. West for the proper irrigation of said lands, pursuant to the contracts attached to complaint in said action and to the Petition herein as Exhibit "B," the expense of such reconstruction work to be paid as directed by said Bankruptcy Court; and

IT IS FURTHER ORDERED, That the said Glen R. Bothwell, as such trustee, report to this Court his proceedings in the matter on the 5th day of May, 1914, at the hour of ten o'clock A. M.

Dated this 17th day of April, 1914.

FRANK S. DIETRICH,  
United States District Judge.



[Endorsed]: Filed April 17, 1914. A. L. Richardson, Clerk. [46]

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*In the District Court of the United States for the  
District of Idaho, Southern Division.*

IN BANKRUPTCY.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Answer to Order to Show Cause.**

COME NOW T. E. Fitzgerald, W. A. West, Spencer L. Baird, Ben W. Davis, W. E. Sullivan, and L. L. Sullivan, and in response to the Order to Show Cause herein respectfully show:

I.

That they admit that said T. E. Fitzgerald and W. A. West, commenced an action in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the American Falls Canal & Power Company was defendant as set forth in the petition herein; and further admit that the copy of the complaint attached to the petition herein is a true copy of the complaint filed in said cause; and it is further admitted that in and by said action the plaintiffs therein are endeavoring to secure the appointment of a receiver to complete Lateral No. 33 of the Canal System of said defendant company and to have said receiver authorized and directed to collect certain deferred payments from the water-right holders in an amount sufficient to complete said lateral, not to exceed the sum of

\$2,500.00, as alleged in the petition herein and as set forth in the complaint in said action. [47]

## II.

That said answering parties herein deny that the application of said deferred payments to the completion of said canal will in any wise damage other creditors of said bankrupt contrary to the provisions of said bankruptcy law or otherwise, and in this respect allege, that said deferred payments to the amount necessary to complete said Lateral No. 33 are not property or assets of said bankrupt estate within the meaning of the bankruptcy law now in force; that the trustee of the estate of said bankrupt is not vested by operation of law or otherwise with the title of the bankrupt, if any, in and to said deferred payments; that the same are not such assets, if assets at all, which are available or can be made available for the payment of the claims of the creditors of said bankrupt; that under the laws of the State of Idaho, wherein said canal system is located and the lands of the water-right holders under said system are also located, said deferred payments or sufficient thereof must be applied for the completion of said Lateral No. 33.

WHEREFORE, These answering parties pray:

I. That no restraining order be made or entered as prayed for in the petition herein.

II. That if the Court herein concludes that said deferred payments are assets of the estate of said bankrupt, and should be under the control of an ancillary trustee to be appointed by this Court, then said T. E. Fitzgerald and W. A. West further pray

that this Court treat their said complaint filed in the District Court of the State of Idaho, in and for Power County, a copy of which is among the files of this proceeding, as their petition and that the relief prayed for therein may be granted [48] by this Court and that the ancillary trustee appointed by said Court be directed to complete said Lateral No. 33 and that the said trustee be authorized to collect the deferred payments in an amount sufficient to complete the same as prayed for in said complaint.

III. And for such other and further relief as may be just and equitable in the premises.

T. E. FITZGERALD, and  
W. A. WEST,  
By BAIRD & DAVIS,  
SULLIVAN & SULLIVAN,  
Attorneys for Said Parties.

State of Idaho,  
County of Ada,—ss.

W. E. Sullivan, being first duly sworn, deposes and says:

That he is one of the attorneys for the answering parties, T. E. Fitzgerald and W. A. West, in the above-entitled cause, and makes this verification for and on behalf of said parties; that he has read the foregoing, knows the contents thereof and that he believes the facts stated therein to be true; that the reason why this verification is not made by the said parties, T. E. Fitzgerald and W. A. West, is because said parties are absent from Ada County, where said attorney resides.

W. E. SULLIVAN.



Subscribed and sworn to before me this 16th day of April, 1914.

[Notarial Seal]      R. GARLAND DRAPER,  
Notary Public.

[Endorsed]: Filed April 17, 1914. A. L. Richardson, Clerk. [49]

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**[Order on Application for Restraining Order.]**

At a stated term of the District Court for the District of Idaho, held at Boise, Idaho, Friday, the 17th day of April, 1914. Present: The Honorable FRANK S. DIETRICH, Judge.

No. 679.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

On this day this cause came on to be heard upon the application of Glenn R. Bothwell, Trustee, for a restraining order to stay proceedings in action in the District Court for Power County, Idaho, wherein T. E. Fitzgerald and W. A. West have instituted proceedings for the appointment of a receiver to take possession of the assets of said bankrupt, J. D. Skeen, Esqr., appearing as counsel on behalf of the Trustee, and Messrs. Sullivan & Sullivan, on behalf of the said T. E. Fitzgerald and W. A. West, and after argument by the respective counsel, the Court ordered that an order be drawn by the attorneys in accordance with the views of the Court, to be signed and filed in the case. [50]

**Report of Trustee.**

*In the District Court of the United States for the  
District of Idaho.*

**IN BANKRUPTCY.**

**In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.**

**REPORT.**

Comes now Glenn R. Bothwell, as trustee in the above matter, and respectfully reports to the Court:

That immediately after the entry of the order herein on the 17th day of April, 1914, wherein he was required to make application to the District Court of the United States for the District of Utah, for instructions respecting lateral No. 33 of the American Falls Canal, he proceeded to secure such information as he deemed necessary to fully present said matter to said Court, and after securing copies of all necessary documents, he caused said matter to be presented to Hon. John A. Marshall, Judge of the said Court, in chambers, and his attorney in said matter was informed that said court was then engaged in the trial of jury cases, and would not be able to hear said matter before the 2d day of May, 1914.

That thereafter and before the *said and day* of May, 1914, your petitioner, by his attorney, called on said Judge again for the purpose of urging the hearing of said petition at an earlier date; that said Judge was then in the midst of the trial of an im-

portant jury case, and again indicated that he could not hear said matter before Saturday, May 2d, 1914.

That on said date your petitioner, by his attorney, appeared in said court before the Hon. John A. Marshall presiding, [51] and presented his petition in said matter, a copy of which is hereto attached and made a part of this return. That after said petition was duly presented and said matter fully explained to the Court, said Court took the matter under advisement.

Your petitioner further reports that by said petition and the exhibits thereto attached, said entire controversy is fully and fairly presented to the Court, except in so far as oral descriptions of said lateral No. 33 as constructed by engineers and others fully informed as to the facts may be necessary for a full determination of said controversy.

Your petitioner further says that as an officer of said District Court of the United States for the District of Utah, and in performance of his duty to this Court in this ancillary proceeding, he will present to the said District Court of the United States for the District of Utah any further or additional oral or documentary evidence that this Court may deem necessary or advisable for a proper determination of said controversy.

Respectfully submitted,

J. D. SHEEN,

Attorney for Glenn R. Bothwell, Trustee in Bankruptcy of the American Falls Canal & Power Company. [52]



*In the United States District Court in and for the  
District of Utah.*

No. 1763—IN BANKRUPTCY.

In the Matter of AMERICAN FALLS CANAL &  
POWER COMPANY, a Corporation,  
Voluntary Bankrupt.

**Petition [for Determination and Adjudication of  
Controversies, etc.].**

The petition of Glenn R. Bothwell, as Trustee in Bankruptcy, of the American Falls Canal & Power Company, a corporation, respectfully shows to the Court:

I.

That on the 24th day of February, A. D. 1914, the American Falls Canal & Power Company, a corporation organized under and pursuant to the laws of the State of Utah, filed its voluntary petition in bankruptcy in the above-entitled court, wherein it prayed to be adjudicated a bankrupt under the laws of the United States; that thereafter, on the 27th day of February, A. D. 1914, said Court made and entered its order in said matter, adjudicating said American Falls Canal & Power Company a bankrupt, within the purview of said laws of the United States, and referred the estate of said bankrupt to the Honorable Charles Baldwin, Referee in Bankruptcy of said court, for administration.

II.

That after the reference of said matter to said Referee, said Referee caused notice to creditors to

be published, pursuant to law and the order of the Court, and on the 16th day of March, A. D. 1914, a meeting of the creditors of said bankrupt was held before the Honorable Charles Baldwin, Referee in Bankruptcy, at Salt Lake City, State of Utah, and at said meeting, claims were proved and allowed by said Referee, and the creditors of said Bankrupt, by their votes, elected Glenn R. Bothwell, your petitioner, Trustee in Bankruptcy in this matter, and upon such [53] selection, said Referee duly made and entered an order, appointing the said Glenn R. Bothwell, Trustee in such proceeding, and fixed his bond at the sum of \$100,000.00. That thereafter, on said date, said Glenn R. Bothwell executed and delivered said bond and did all things that were necessary to qualify him as such Trustee, and he, your petitioner, is now the duly elected, appointed, qualified and acting Trustee in the matter of the bankruptcy of the said American Falls Canal & Power Company.

### III.

Your petitioner, in order to set forth the character of said bankrupt's estate, further represents that on the 18th day of August, A. D. 1894, the United States enacted a law providing for the reclamation of arid lands in the various States, the same being entitled "An act making appropriation for the sundry civil expenses of the Government for the fiscal year ending June 30th, A. D. 1893, and for other purposes" (28 Stat. L. 422), and amendment thereto, by the act of June 11th, A. D. 1896 (29 Stat. L. 434), and also the amendment thereto by the act of March

3d, 1901 (31 Stat. L. 1188), commonly known and hereinafter designated the "Carey Act."

#### IV.

That by Chapter 5, title 7, of the Revised Codes of the State of Idaho, the State of Idaho accepted the terms and conditions of said Carey Act, together with all the amendments thereto, and all the grants of land to the said State of Idaho under the provisions of said act and the amendments thereto, and by said chapter, said State of Idaho vested the selection, management and disposal of said lands in the State Board of Land Commissioners of said State, as constituted by section 7, of article 9, of the Constitution of the State of Idaho, and gave said State Board of Land Commissioners and the State Engineer of said State the supervision and direction of the construction of a canal and [54] irrigation system.

#### V.

That pursuant to said Carey Act, and the acceptance thereof by the State of Idaho, as hereinbefore set forth, the United States, through its officers, on the 19th day of July, A. D. 1899, entered into a contract with the State of Idaho by which were set forth certain terms upon which said State of Idaho should permit the construction of said canal and irrigation system.

#### VI.

Thereafter, pursuant to said Carey Act, the acts of the Legislature of the State of Idaho, accepting the terms and provisions thereof, and said contract entered into between the United States and the State



of Idaho, the State of Idaho did, on the 23d day of February, A. D. 1901, enter into a contract in writing with the said American Falls Canal & Power Company, a corporation, organized and existing under the laws of the State of Utah, and duly authorized to do business in the State of Idaho, by the terms of which contract the said American Falls Canal & Power Company agreed to construct a canal from a point on the west bank of Snake River, about ten miles north and east of the City of Blackfoot, State of Idaho; thence southwesterly, through the counties of Bingham and Blaine (now Power), for the irrigation of the lands segregated, as set forth in said contract between the United States and the State of Idaho. Said contract entered into by and between the State of Idaho and said company, among other things provided specifications as to the construction of said canal and irrigation system, rights of way over said lands for the construction and operation of said canal and irrigation system, and that said company should build said canal and irrigation system, with all the structures belonging thereto, in a [55] good and substantial manner, and in accordance with the specifications therein provided, and under the supervision and to the satisfaction of the State Engineer of Idaho, and that said company, upon completion thereof, transfer to the owners and holders of shares of water right the control and management of said system, together with all rights and franchises belonging thereto.

## VII.

That after the execution of said contract between

the State of Idaho and the said company, said company proceeded to construct said canal and irrigation system, and to sell, after permission was granted by the State of Idaho, shares of water right to actual settlers under said system.

### VIII.

For the purpose of securing funds for the construction of said canal and irrigation system, said American Falls Canal & Power Company did, on the 2d day of October, A. D. 1905, execute a deed of trust to the People's Bank & Trust Company, a corporation having its office and principal place of business at Rockford, Illinois, trustee for bondholders, to secure the payment of a first mortgage bond issue in the sum of \$300,000.00, and under said deed of trust did mortgage to said People's Bank & Trust Company all its corporate property, of whatever kind, real or personal, wherever situated, then owned or thereafter acquired, and particularly the right of way of said company's irrigation canal, together with all of the buildings, ditches, laterals, flumes, head-gates, syphons, wasteways, appliances, appurtenances, fixtures and personal property then or thereafter built or constructed; also a water right, consisting of 1250 cubic feet of water per second of time, continuous flow, diverted from the Snake River, in said State; also all rights of way, easements, privileges and franchises granted by the United States Government by the Constitution and [56] laws of the State of Idaho, or by purchase, or by rights under said contract between the State of Idaho and the United States, and said contract between the State



of Idaho and said company; also all notes, mortgages, contracts and other evidences of indebtedness then owned or thereafter acquired by said company, which had been or might thereafter be received in payment for water rights sold and to be sold to the owners and claimants of land susceptible of irrigation from said irrigation works, all of which said notes, mortgages, contracts and other evidence of indebtedness to be deposited with said trustee for bondholders for the purposes therein mentioned; also all the right, claim, interest and lien then existing or thereafter acquired by said company, in whatsoever manner, in and to the tracts of land hereinbefore mentioned; and the said deed of trust was duly recorded in the counties of Bingham and Blaine (now Power), State of Idaho.

#### IX.

For the purpose of securing further funds for the construction of said canal and irrigation system, said American Falls Canal & Power Company did, on the first day of October, A. D. 1908, execute a second deed of trust to said People's Bank & Trust Company, trustee for bondholders, to secure the payment of an issue of second mortgage bonds in the sum of \$400,000.00, and under said deed of trust, did give a second mortgage upon all of said company's corporate property, as in the next preceding paragraph set forth, and said deed of trust is duly recorded in the Counties of Bingham and Blaine (now Power), State of Idaho.

#### X.

Your petitioner further alleges that the several



bonds included in said first and second issue were negotiated and sold at substantially the face thereof, less the cost only of marketing, and the moneys realized therefrom devoted to the betterment of said property and the construction of said canal system; that of the [57] first issue of bonds, all has been paid except the sum of \$56,000.00, due on the first day of October, A. D. 1915, and of the second bond issue no part has yet been paid, and the principal sum of \$400,000.00 is due on the first day of October, A. D. 1918.

### XI.

That on the 8th day of December, A. D. 1906, for and in consideration of the sum of \$4,000.00 to be paid with interest in ten annual installments, the receipt of the first of which, a cash payment of \$80.00, being thereby acknowledged, said American Falls Canal & Power Company made and executed its certain warranty deed in writing, a copy of which is hereto attached, marked Exhibit "A," and by this reference thereto made a part hereof, and the same was delivered, in keeping with said deeds of trust, to the Utah Mortgage Loan Corporation, fiscal agent for the People's Bank & Trust Company, trustee for the bondholders, at Logan, State of Utah; by which said deed said company conveyed to W. A. West 160 shares of water right, from its said appropriation, together with a proportionate interest in said canal and irrigation system.

### XII.

That on the 8th day of December, A. D. 1906, for and in consideration of the sum of \$4,000.00 to be paid with interest in ten annual installments, the

receipt of which, a cash payment of \$480.00, being thereby acknowledged, said American Falls Canal & Power Company made and executed its certain warranty deed in writing, a copy of which is hereto attached, marked Exhibit "B," and by this reference thereto made a part hereof, and the same was delivered, in keeping with said deeds of trust, to the Utah Mortgage Loan Corporation, fiscal agent for the People's Bank & Trust Company, trustee for the bondholders, at Logan, Utah; by which said deed, said company conveyed to Mary A. Fitzgerald 160 shares of water right, from its said appropriation, together with a proportionate interest in said canal and irrigation system. [58]

### XIII.

That said American Falls Canal & Power Company notified, on or about the month of April, A. D. 1910, the water-users under said canal and irrigation system that said system was completed, and, pursuant to a general notice, a *meeting the* water-users of this system was held, at which meeting a majority of said water-users was present, and said water-users did, in said meeting assembled, resolve to organize an operating company for the control and management of said irrigation system. That during the month of June, A. D. 1910, the water-users under said canal and irrigation system did organize the Aberdeen-Springfield Canal Company, a corporation existing under and by virtue of the laws of the State of Idaho, for the purpose of taking over the control, possession, management and operation of said system, and said Aberdeen-Springfield Canal



Company made the delivery of water for the irrigation season of 1910 and every year thereafter.

#### XIV.

The said American Falls Canal & Power Company did, on the 28th day of November, A. D. 1910, present a petition to the Idaho State Board of Land Commissioners, wherein it set forth matters in connection with said transfer of said canal and irrigation system from said company to the said Aberdeen-Springfield Canal Company, and therein particularly alleged; the completion of said canal and irrigation system; the appointment by said Aberdeen-Springfield Canal Company of a committee to act in connection with the Engineer of said American Falls Canal & Power Company and the State Engineer in the examination of the system; the making of such an examination; the submitting of a report by said examining committee; the adoption of said report by the Aberdeen-Springfield Canal Company by a resolution and the vote of the shareholders thereon; the acceptance of shares of stock in said Aberdeen-Springfield Canal Company by said [59] water-users; and a petition that the said American Falls Canal & Power Company be relieved from further obligation as regards canal construction and the reclamation of lands, and that their bond for the proper fulfillment of their contract with the State be released. A copy of said petition is hereto attached and marked Exhibit "C"; a copy of the report of said examining committee is hereto attached and marked Exhibit "D"; a copy of said resolution of the Aberdeen-Springfield Canal Company is hereto attached and marked Ex-



hibit "E"; a copy of the report of D. C. Martin, State Engineer of the State of Idaho, to the Idaho State Board of Land Commissioners, made December 2, 1910, is hereto attached and marked Exhibit "F"; and a copy of an extract from the minutes of a meeting of the Idaho State Board of Land Commissioners held December 1st, A. D. 1910, is hereto attached and marked Exhibit "G"; and all of said exhibits are by this reference thereto made a part of this petition.

#### XV.

That the report of said examining committee sets forth thirteen (13) minor items in connection with the construction of said canal and irrigation system, which, in the opinion of said examining committee, should be corrected and improved by said American Falls Canal & Power Company; that thereafter, the said company executed and filed its bond in the sum of \$10,000.00, for the completion of said items; that said items have long since been completed, as suggested, and the bond given in connection therewith released.

#### XVI.

That prior to the time of the transfer of said canal and irrigation system to the water-users under said system, as represented by the said Aberdeen-Springfield Canal Company, hereinbefore described, the said W. A. West, mentioned in paragraph XI of this petition, and the said Mary A. Fitzgerald, mentioned in paragraph XII [60] of this petition, as holders of contracts for the purchase of water rights, had made certain objections to the construction work of

said American Falls Canal & Power Company in relation to a certain lateral No. 33, which was intended to supply the adjoining farms of said W. A. West and said Mary A. Fitzgerald with water, which said lateral No. 33 was constructed and built on or before August, A. D. 1909; that thereafter, to wit, on the 9th day of November, A. D. 1909, Mary A. Fitzgerald entered into a certain contract in writing for the extension of time for making payments and releasing said company from any and all claims for damages arising from any failure on the part of said company theretofore arising, and a copy of said contract is hereto attached and marked Exhibit "H"; and by this reference thereto made a part of this petition; and that the alleged defects in the construction of said lateral No. 33 were not among the said thirteen items suggested for improvement by the said examining committee.

## XVII.

That after the transfer of said canal and irrigation system, hereinbefore mentioned, said Mary A. Fitzgerald and W. A. West reasserted their claims in connection with the construction of said lateral No. 33; that said company sought to adjust the controversy which ensued by offering to rebate the sums due on said contracts in proportion to any acreage in said tracts of land which might be too high for profitable irrigation from said lateral No. 33; that such efforts for settlement failed, and said W. A. West and Mary A. Fitzgerald each did, on the 22d day of March, A. D. 1913, bring an action at law against said American Falls Canal & Power Com-



pany in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, and sought thereby to recover damages for the loss of trees and crops alleged to have been set out and planted during various seasons prior to that date, and the losses [61] of flumes and ditches alleged to have been constructed upon their said land; said loss by them alleged to be due to the failure of said company properly to construct said lateral No. 33. A copy of the summons and complaint in said action brought by said W. A. West is hereto attached and marked Exhibit "I," and a copy of the summons and complaint in the action brought by Mary A. Fitzgerald is hereto attached and marked Exhibit "J," and both are by this reference thereto made a part of this petition.

#### XVIII.

That thereafter, on the 13th day of September, A. D. 1913, judgment was entered by said court of the Fifth Judicial District of the State of Idaho, for the County of Power, against said American Falls Canal & Power Company and in favor of said Mary A. Fitzgerald, in the sum of \$2,715.00, with costs; that within the statutory time after the entry of said judgment, said American Falls Canal & Power Company filed a motion for a new trial and the same was pending at the time of the adjudication in Bankruptcy hereinbefore mentioned; and that thereafter, said motion for a new trial was overruled upon default of prosecution by said Bankrupt, and said judgment is listed by said Bankrupt in its schedules in



Bankruptcy, herein on file, as a claim against said bankrupt.

XIX.

That at the March term of the District Court of the Fifth Judicial District of the State of Idaho, for Power County, the action brought by the said W. A. West was pending against said American Falls Canal & Power Company, and after the adjudication of the said company as a bankrupt, and the appointment of said Trustee in Bankruptcy, the said Trustee in Bankruptcy was not made a party and was not substituted as defendant, nor did he in any manner appear; that notwithstanding the premises, by consent of the attorneys of record for the parties in said action, judgment was given and [62] made in favor of the plaintiff and against the American Falls Canal & Power Company, then a bankrupt, for the sum of \$2,715.00, with costs.

XX.

That on and prior to the 6th day of April, A. D. 1914, the said W. A. West and Mary A. Fitzgerald and T. E. Fitzgerald, husband of the said Mary A. Fitzgerald, had notice and full knowledge of the proceedings in bankruptcy herein, the adjudication of the said American Falls Canal & Power Company, as such bankrupt, and the appointment of such Trustee; nevertheless the said parties, claiming that said lateral No. 33 was defective, and that because of said defects, from time to time damages were accruing from loss of crops, said damages being continuing, commenced an action against the American Falls Canal & Power Company in the District Court in and

for Power County, State of Idaho; that in and by said action, the said parties ignored the proceedings in bankruptcy, above referred to, and the appointment of said Trustee, and sought, by their complaint therein, to procure the appointment of a receiver of the assets and effects of said bankrupt, and to enforce in such receivership proceedings the repair and completion of said lateral No. 33, and its construction, as they claimed, and the application of a portion of the moneys accruing due on said contracts and covered by said deed of trust to the People's Bank & Trust Company, for that purpose; that on said 6th day of April, A. D. 1914, the said W. A. West and T. E. Fitzgerald caused summons to be issued and served upon said American Falls Canal & Power Company, and upon the same date, applied to the Court for, and the Court issued an order, requiring the said American Falls Canal & Power Company, to appear, before Alfred Budge, Judge, at American Falls, State of Idaho, on the 11th day of April, A. D. 1914, and show cause, if any it had, why an order should not be made and entered by said Court, appointing a receiver for the purposes hereinbefore set out; that a copy of said complaint, [63] summons and order to show cause is hereto attached and marked Exhibit "K," and by this reference thereto made a part of this petition.

#### XXI.

That upon receiving a notice of the action mentioned in the next preceding paragraph, your petitioner, as Trustee in Bankruptcy, did forthwith file, in the District Court of the United States, for the



District of Idaho, a petition setting forth that said action had been instituted and praying that the parties involved therein should be required to show cause before the Honorable Frank S. Dietrich, Judge, why they should not be permanently enjoined from instituting a proceeding in any State court of said State of Idaho, against said bankrupt, and from directly or indirectly interfering with the disposition of the assets of said bankrupt, and in the meantime praying for a temporary restraining order, and for other and further relief, as is set forth by said petition, a copy of which is hereto attached and marked Exhibit "L," and by this reference thereto made a part of this petition.

## XXII.

That on the said 11th day of April, A. D. 1914, your petitioner, by his attorneys, filed a petition in the said District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, setting forth in detail the petition in bankruptcy herein, the adjudication by this Court and the appointment of your petitioner as Trustee, and also suggesting the ancillary proceedings hereinbefore referred to, pending before the District Court of the United States for the District of Idaho, and requested the said Court, Honorable Alfred Budge presiding, to stay the proceedings in said action; that notwithstanding said petition and the said application for the stay of said proceeding, the said State Court, on the 13th day of April, A. D. 1914, made and entered an order for the appointment of a receiver, with power to do the things prayed for [64] in said



complaint; that before a receiver qualified or said order had become effective, on the said 13th day of April, A. D. 1914, the United States District Court for the District of Idaho, issued an order requiring the said T. E. Fitzgerald and W. A. West, and their attorneys, to appear before that court on the 17th day of April, A. D. 1914, and show cause why they should not be enjoined from further proceeding in said suit in the State Court, and in the meantime, and before said order could be heard, enjoining the said T. E. Fitzgerald and W. A. West, and their attorneys, from further prosecuting said proceedings in the State court; that on the 17th day of April, A. D. 1914, said order to show cause came on regularly for hearing, and after the introduction of evidence, showing the adjudication of said American Falls Canal & Power Company to be a bankrupt, the reference of said matter to Charles Baldwin, as Referee in Bankruptcy, and the appointment of your petitioner as Trustee, and his qualification as such, the said United States District Court for the District of Idaho made and entered an order, permanently enjoining the further prosecution of said suit in the State court; that in and by said order, so made by the United States District Court for the District of Idaho, the Court directed and provided that proceedings and controversies in respect to the construction of said lateral No. 33 should be carried on and determined by the United States District Court in and for the District of Utah, as a court of bankruptcy, and directed your petitioner to file in said United States District Court for the District of Utah, a petition, suggesting the

situation, and providing for such repairs, alterations and changes as this Court might determine with respect to said lateral No. 33; that a copy of said order is hereto attached, marked Exhibit "M," and by this reference thereto made a part of this petition. And it is pursuant to said order that your petitioner files this petition herein. [65]

### XXIII.

Your petitioner further shows that one of the trust deeds above recited, to wit, the trust deed of October 2, A. D. 1905, was executed and recorded prior to the making of the water contracts of the said W. A. West and T. E. Fitzgerald, hereinbefore referred to; that the said W. A. West and T. E. Fitzgerald took the water contracts with full knowledge and notice of said trust deed, and that the said contracts are subsequent and subordinate to the lien of said trust deed; that by the term of said trust deed, it is expressly provided that the trustee should release and satisfy the water rights, shares and interests evidenced by said contracts when and only when full payment of the notes, mortgages, contracts and other evidences of indebtedness had been made. Your petitioner further shows that the second of said trust deeds, to wit, the trust deed of date October first, A. D. 1908, was made under and pursuant to the act of Congress and the amendments thereto, hereinbefore referred to, known as the Carey Act, and by the express terms of said trust deed, the same became and was superior and prior to any claim under said water contracts until the full payment of the amount of said contracts. Your petitioner



further shows that neither the trustee under said trust deeds nor the trustee in bankruptcy herein holds any money applicable to the repair, alteration or extension of the laterals of said canal system, and that the said W. A. West and T. E. Fitzgerald refuse to make any of said repairs themselves, pretending and claiming that under the judgments hereinbefore recited, they have the right to retain and hold all of the moneys due or to become due under their water contracts until the entire amount of said judgments has been paid in full, and that meanwhile they may charge, as against the Bankrupt, the Trustee in said trust deed all accruing damages from loss of crops, by reason of the claimed insufficiency and alleged improper construction of said Lateral No. 33. That in substance and [66] effect the said W. A. West and T. E. Fitzgerald contend that the said lateral No. 33 should be elevated so that a delivery of water could and would be made upon all and every part of the lands referred to in said water deed, and that until, by the elevation of said lateral No. 33 and a delivery of water through the lateral as so changed, the water is placed upon said land, they are not only entitled to refuse to make every payment upon their contracts, but in addition they claim loss of crops, past and prospective, so long as said lateral No. 33 remains in its present condition and situation.

#### XXIV.

Your petitioner alleges and avers, on information and belief, that the said lateral No. 33 was properly constructed; that the said American Falls Canal &



Power Company has fully performed all of the conditions of the said water contracts on its part to be performed; that the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald, —— have accepted said lateral No. 33 as constructed in full performance of said contract; that neither the trustee for the bondholders under said deeds of trust, nor your petitioner, as such Trustee in bankruptcy, is in possession of said canal and irrigation system, nor has either of said parties any power or authority to change the situation of said lateral No. 33, nor in any way to interfere at all with any part of said canal or irrigation system; that if the said W. A. West, Mary A. Fitzgerald or T. E. Fitzgerald have any claim at all, either under said judgments or by reason of claimed breaches of said water contracts, the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald are in the same class with general creditors and are entitled only to participate in said estate in the same rank with the general creditors, and are not entitled to any preference whatsoever, nor any claim, by setoff or otherwise, in preference and to the prejudice of other creditors.

#### XXV.

Your petitioner further alleges and avers that the [67] assets of said estate consist wholly of the equity in and the residue of the property covered by said deeds of trust, as hereinbefore set forth, after the payment of said deeds of trust; that the claims of the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald and the alleged defenses to said water contract constitute clouds upon said equity and

seriously impair the marketability and value of said equity; that if the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald have any claims at all, the same claims should be settled and adjudicated at this time in this bankruptcy proceeding, and that in the event the Court shall adjudge and determine that the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald have any claim at all, the equity of your petitioner, as such Trustee in bankruptcy, in and to said water contracts should be sold, and the said property converted into cash and the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald be required to resort to said fund in satisfaction of any claims or offsets which they may have against said equity or said contracts, and that the said equity and said contracts be freed and cleared of all defenses and claims made by the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald.

WHEREFORE, your petitioner having fully set forth facts, respectfully prays the Court:

1. That the Court set this petition for a hearing at a *certain*, and that the Court designate the parties upon whom notice of the hearing of this petition shall be served, and the time and manner of such service.

2. That the Court determine and adjudicate all controversies with respect to the matters in the foregoing petition set forth.

3. That the Court adjudge and decree the claims of the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald wholly invalid and that upon final hearing, the said parties be restrained and enjoined



from making any claim adverse to the rights of your [68] petitioner, as such Trustee in bankruptcy, and from in any manner interfering with the estate of said bankrupt, and that in the meantime and pending such final hearing, the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald be enjoined and restrained from in any manner interfering with the estate of said bankrupt or the possession or administration thereof by your petitioner.

4. That if the Court should determine it proper and within the power of your petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner to reconstruct said lateral No. 33, as suggested in the order made by said United States District Court for the District of Idaho, and for that purpose that the Court determine the nature and extent and the amount of money to be expended for such construction work, and that the Court determine at whose expense and in what manner such work should be done.

5. That in the event the Court shall determine that any of the claims of the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald are defensive to the equity of your petitioner in and to said contracts, or are defenses at all under said contracts, that the equity and right of your petitioner in and to said contracts be converted into cash, that said equity be sold free and clear of all defenses, and that the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald be required to resort to the funds so obtained for the satisfaction of said claims.



6. For any other and further relief in the premises as may to the Court seem meet and equitable.

J. D. SKEEN,

L. R. MARTINEAU,

ISAAC BLAIR EVANS,

Solicitors for Petitioner. [69]

State of Utah,

County of Salt Lake,—ss.

Glenn R. Bothwell, being first duly sworn, upon his oath deposes and says: I am the Trustee in bankruptcy of the American Falls Canal & Power Company, a corporation, bankrupt, and the petitioner in the foregoing instrument. I know the contents of said petition, and the same is true of my own knowledge, except as to matters therein alleged upon information and belief, and as to those matters I believe it to be true.

Subscribed and sworn to before me this —— day  
of ——, A. D. 1914.

\_\_\_\_\_,  
Notary Public. [70]

**Exhibit "A" [to Petition for Determination and  
Adjudication of Controversies, etc.—Agreement].**

**EXHIBIT "A."**

**AMERICAN FALLS CANAL & POWER CO.**

**WARRANTY DEED.**

No. 358.

**THIS AGREEMENT**, entered into by and between **THE AMERICAN FALLS CANAL & POWER COMPANY**, a corporation (hereinafter

called the Company), party of the first part, and W. A. WEST of American Falls, County of Oneida, State of Idaho (hereinafter called the purchaser), party of the second part:

WITNESSETH: That for and in consideration of the sum of Four Thousand Dollars, to be paid to the PEOPLE'S BANK & TRUST COMPANY, a corporation, at its bank at Rockford, Illinois, as hereinafter specified, and in consideration of the mutual covenants and agreements in this contract contained, to be kept and performed the said parties hereby mutually covenant and agree as follows:

I.

The Company hereby warrants and conveys to the purchaser One Hundred Sixty shares of perpetual water right out of the water appropriated by it from the Snake River in Idaho, to be used during the irrigation season, that is to say, between the 1st day of April and the 1st day of November of each year, and for each and every year hereafter; together with a proportionate interest in the irrigation works, said proportionate interest being based upon the number of shares of water right finally sold in said canal system. Each share of water right shall represent a carrying capacity sufficient to deliver water at the rate of one-eightieth of one second-foot per acre in main canal, and one-fiftieth of one second-foot per acre in all laterals, limiting, however, the maximum amount of water to be furnished to purchaser during any one irrigation season to two and one-half acre-feet. [71]

## II.

The Company agrees to carry the water to which the purchaser is entitled under this conveyance through its canal system, and to measure and deliver the same at a point within one-half mile from each legal subdivision of 160 acres.

The shares of water right herein conveyed shall attach to and become appurtenant to the following described land in Blaine County, Idaho, to wit:

The West Half of Southeast Quarter and Lots Two, Three and Four of Section Twenty-five, Township Seven (7) South, Range 30 East, Boise Meridian, containing One Hundred Sixty acres.

(Plat for marking.)

## III.

For the purpose of defraying the expense of operating and maintaining said canal system, the Company shall have the right to make an annual charge against the purchaser therefor, which charge shall be made equally and ratably against all of the users of the water from said canal system. But said annual charge shall not be based upon a rate exceeding twenty cents per acre-foot for all water delivered until the full allowance of two and one-half acre-feet shall have been delivered, and the rate shall not exceed fifty cents per acre-foot for all water delivered in excess thereof, but no charge shall be made for any water unless delivered at the request of purchaser, provided, however, that during the first irrigation season that purchaser is able to secure water from said canal system one-fourth of the full allowance of two and one-half acre-feet



of water shall be delivered free of all charge, thereafter the rates above specified shall govern. Said annual charge shall be due and payable on the first day of November of the year for which said charge is made, and the failure of the [72] purchaser to pay said charge within thirty days after the same becomes due shall constitute a default for which the Company may foreclose the rights of the purchaser as provided herein, and the Company shall have the right to suspend the further delivery of water to said purchaser while such default continues.

#### IV.

The purchaser agrees to pay the Company for said shares of water right, \$25.00 per share in the manner following, to wit:

PAYMENTS.	Date Due.			Principal.		Interest,		Total Amount.	
	Month.	Day.	Year.	Doll.	Cts.	Doll.	Cts.	Doll.	Cts.
Cash	Dec.	8th,	1906	\$480.00					
First Deferred	Dec.	8th,	1907	320.00		\$211.20		\$531.20	
Second Deferred	Dec.	8th,	1908	400.00		192.00		592.00	
Third Deferred	Dec.	8th,	1909	400.00		168.00		568.00	
Fourth Deferred	Dec.	8th,	1910	400.00		144.00		544.00	
Fifth Deferred	Dec.	8th,	1911	400.00		120.00		520.00	
Sixth Deferred	Dec.	8th,	1912	400.00		96.00		496.00	
Seventh Deferred	Dec.	8th,	1913	400.00		72.00		472.00	
Eighth Deferred	Dec.	8th,	1914	400.00		48.00		448.00	
Ninth Deferred	Dec.	8th,	1915	400.00		24.00		424.00	

The first payment is hereby acknowledged. Deferred payments shall bear interest at the rate of six per cent per annum, payable annually. Any deferred payment paid before due shall stop the running of interest thereon.

#### V.

To secure the payment to the Company of all deferred payments and the interest thereon, and any

charges made to defray the expense of operating and maintaining said canal system as herein provided, said Company shall have and retain a lien on said shares of water right, and on all the right, title and interest of purchaser acquired or hereafter to be acquired in and to the land herein described, which said lien shall be in all respects prior and superior to any and all liens now, or hereafter created, or attempted to be created by said purchaser, and the same shall [73] remain in full force and effect until all the covenants herein made by the purchaser shall have been fully performed.

#### VI.

In case the purchaser shall fail to make the payments aforesaid, or either of them, or the interest thereon, at the times and upon the terms prescribed, or shall fail to observe and perform any of the conditions or covenants herein contained, the holder hereof may declare all subsequent payments due, and may proceed at law or in equity to foreclose all of the right, title and interest of said purchaser in and to said shares of water right and the land herein described; or the holder hereof may, at his option proceed to sell in accordance with any statutory remedy given by law, said shares of water right and said land in satisfaction of said sums.

#### VII.

The Company shall devise and make, subject to the approval of the State Engineer and the State Board of Land Commissioners of Idaho, all needful rules and regulations governing the management and distribution of water from said canal system,

not inconsistent with the laws of the United States, the laws of the State of Idaho, and the contract between the State and the Company applicable thereto, which rules and regulations shall provide for the distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water therein. In case of shortage of water in the Company's canal, through accident, drought or scarcity in any natural stream supplying said canal, or by reason of improper diversion of water by any person, or for any other cause beyond its control, the Company shall not be liable for such shortage nor for any damage caused thereby, nor shall there be by reason thereof, any deduction from any sum herein agreed to be paid by the purchaser. [74]

#### VIII.

It is understood and agreed by both parties hereto that the PEOPLE'S BANK & TRUST COMPANY, a corporation, with its principal office at Rockford, Illinois, Trustee, is exclusively entitled to receive and acknowledge all payments made upon this contract, and to execute in behalf of the Company receipts and acquittances therefor.

#### IX.

The purchaser hereby agrees to allow the Company any rights of way through the land herein described which may be needed for the construction of the canal or any lateral. Said rights of way shall be equal to the actual width of said canal or lateral at its base, from toe to toe, together with a strip of land along one side of the canal one hundred feet



in width, and a strip of land along one side of every lateral thirty feet in width, all of which strips of land may be used for an open roadway or other useful purpose.

X.

IT IS FURTHER AGREED, that each and every of the terms and conditions herein expressed shall extend to and be binding upon the successors and assigns of the Company, and upon the heirs, legal representatives, successors or assigns of the purchaser. It is agreed between the parties hereto, that when the said purchaser shall have complied with all the conditions contained herein, and shall have completed all payments as herein provided, then this deed shall give a clear and unincumbered perpetual right to the purchaser for the shares of water herein described, and thereupon the Company agrees to acknowledge the full payment and performance of purchaser, and to satisfy and discharge, in the manner provided by law, the lien herein created.

IN WITNESS WHEREOF, the parties hereto have set their [75] hands and seals in duplicate this 8th day of December, A. D. 1906.

(Signed) AMERICAN FALLS CANAL &  
POWER COMPANY.

By F. A. SWEET,  
Vice-President.

[Corporate Seal]

J. R. SHRECK,  
Secretary.

W. A. WEST,  
Purchaser.

Signed, sealed and delivered by said Corporation  
in the presence of

NORA M. JONES,  
Witnesses.

Copy for State of Idaho.

State of Idaho,  
County of Bannock,—ss.

On this 7th day of March, in the year 1907, before  
me, Nora M. Jones, a Notary Public in and for the  
County of Bannock, State of Idaho, personally ap-  
peared J. R. Shreck, known to me to be the Secretary  
of the corporation that executed the instrument,  
and acknowledged to me that such corporation exe-  
cuted the same.

[Notarial Seal]

NORA M. JONES,  
Notary Public. [76]

**Exhibit "B" [to Petition for Determination and  
Adjudication of Controversies, etc.—Agree-  
ment].**

**EXHIBIT "B."**

**AMERICAN FALLS CANAL & POWER COM-  
PANY.**

**WARRANTY DEED.**

No. 357.

THIS AGREEMENT, entered into be and be-  
tween The American Falls Canal & Power Company,  
a corporation (hereinafter called the Company),  
party of the first part, and T. E. Fitzgerald of Amer-  
ican Falls, County of Oneida, State of Idaho (here-  
inafter called the purchaser), party of the second  
part;

WITNESSETH: That for and in consideration of the sum of Four Thousand Dollars, to be paid People's Bank & Trust Company, a corporation, at its Bank at Rockford, Illinois, as hereinafter specified, and in consideration of the mutual covenants and agreements in this contract contained, to be kept and performed, the said parties hereby mutually covenant and agree as follows, to wit:

I.

The Company hereby warrants and conveys to the purchaser One Hundred Sixty shares of perpetual water right out of the water appropriated by it from the Snake River in Idaho, to be used during the irrigation season, that is to say, between the 1st day of April and the 1st day of November of each year, and for each and every year hereafter; together with a proportionate interest in the irrigation works, said proportionate interest being based upon the number of shares of water right finally sold in said canal system. Each share of water right shall represent a carrying capacity sufficient to deliver water at the rate of one-eightieth of one second-foot per acre in main canal, and one-fiftieth of one second-foot per acre in all laterals, limiting, however, the maximum amount of water to be furnished to purchaser during any one irrigation season to two and one-half acre-feet. [77]

II.

The Company agrees to carry the water to which the purchaser is entitled under this conveyance through its canal system, and to measure and deliver the same at a point within one-half mile from each



legal subdivision of 160 acres.

The shares of water right herein conveyed shall attach to and become appurtenant to the following described land in Blaine County, Idaho, to wit: West Half of Northeast Quarter, Lot 1 of Section Twenty-five, Township Seven, South of Range Thirty East, and Lot Eleven of Section Nineteen, and Lots Six and Seven of Section Thirty, both in Township Seven, South of Range Thirty-one East, B. M., of Section ——— Township ——— South, Range ——— East, Boise Meridian, containing One Hundred Sixty Acres.

### III.

For the purpose of defraying the expense of operating and maintaining said canal system, the Company shall have the right to make an annual charge against the purchaser therefor, which charge shall be made equally and ratably against all of the users of the water from said canal system. But said annual charge shall not be based upon a rate exceeding twenty cents per acre-foot for all water delivered until the full allowance of two and one-half acre-feet shall have been delivered, and the rate shall not exceed fifty cents per acre-foot for all water delivered in excess thereof, but no charge shall be made for any water unless delivered at the request of purchaser, provided, however, that during the first irrigation season that purchaser is able to secure water from said canal system one-fourth of the full allowance of two and one-half acre-feet of water shall be delivered free of all charge, thereafter the rates above specified shall govern. Said annual charge

shall be due and payable on the first day of November of the year for which said charge is made, and the failure of the purchaser to pay said charge within thirty days after the [78] same becomes due, shall constitute a default for which the Company may foreclose the rights of the purchaser as provided herein, and the Company shall have the right to suspend further delivery of water to said purchaser while such default continues.

## IV.

The purchaser agrees to pay the Company for said shares of water right, \$25.00 per share in the manner following, to wit:

PAYMENTS.	Date Due.			Principal.		Interest.		Tot. Amount.		Remarks.
	Month.	Day.	Year.	Doll.	¢	Doll.	¢	Doll.	¢	
Cash	Dec.	8th,	1906	\$480.00						Dec. 20
First Deferred	Dec.	8th,	1907	320.00		\$211.20		531.20		1909, pd.
Second Deferred	Dec.	8th,	1908	400.00		192.00		592.00		\$531.20 in
Third Deferred	Dec.	8th,	1909	400.00		168.00		568.00		full for 1st
Fourth Deferred	Dec.	8th,	1910	400.00		144.00		544.00		default. Jan.
Fifth Deferred	Dec.	8th,	1911	400.00		120.00		520.00		4th, 1911,
Sixth Deferred	Dec.	8th,	1912	400.00		96.00		496.00		paid
Seventh Deferred	Dec.	8th,	1913	400.00		72.00		472.00		\$627.52.
Eighth Deferred	Dec.	8th,	1914	400.00		48.00		448.00		
Ninth Deferred	Dec.	8th,	1915	400.00		24.00		424.00		

The first payment is hereby acknowledged. Deferred payments shall bear interest at the rate of six per cent per annum, payable annually, from date until maturity, and thereafter the interest shall be ten per cent per annum, payable annually. Any deferred payment paid before due shall stop the running of interest thereon.

## V.

To secure the payment to the Company of all deferred payments and the interest thereon, and any charges made to defray the expense of operating and maintaining said canal system as herein provided,



said Company shall have and retain a lien on said shares of water right, and on all the right, title and interest of purchaser acquired or hereafter to be acquired in and to the land herein described, which said lien shall be in all respects prior and superior to any and all liens now, or hereafter created, or attempted to be created by said purchaser, and the same shall remain in full force and effect until all the covenants herein made by the purchaser shall have been fully performed. [79]

## VI.

In case the purchaser shall fail to make the payments aforesaid, or either of them, or the interest thereon, at the time and upon the terms prescribed, or shall fail to observe and perform any of the conditions or covenants herein contained, the holder hereof may declare all subsequent payments due, and may proceed at law or in equity to foreclose all of the right, title and interest of said purchaser in and to said shares of water right and the land herein described; or the holder hereof, may at his option proceed to sell in accordance with any statutory remedy given by law, said shares of water right and said land in satisfaction of said sums.

## VII.

The Company shall devise and make, subject to the approval of the State Engineer and the State Board of Land Commissioners of Idaho, all needful rules and regulations governing the management and distribution of water from said canal system, not inconsistent with the laws of the United States, the laws of the State of Idaho, and the contract between



the State and the Company applicable thereto, which rules and regulations shall provide for the distribution of water to the irrigators in turn or by rotation as will best protect and serve the interests of all the users of water therein. In case of shortage of water in the Company's canal, through accident, drought or scarcity of water in any natural stream supplying said canal, or by reason of improper diversion of water by any person, or for any other cause beyond its control, the Company shall not be liable for such shortage nor for any damage caused thereby, nor shall there be, by reason thereof, any deduction from any sum herein agreed to be paid by the purchaser.

#### VIII.

It is understood and agreed by both parties hereto that the People's Bank & Trust Company, a corporation, with its principal office at Rockford, Illinois, Trustee, is exclusively entitled to [80] receive and acknowledge all payments made upon this contract, and to execute in behalf of the Company receipts and acquittances therefor.

#### IX.

The purchaser hereby agrees to allow the Company any rights of way through the land herein described which may be needed for the construction of the canal or any lateral. Said rights of way shall be equal to the actual width of said canal or lateral at its base, from toe to toe, together with a strip of land along one side of the canal one hundred feet in width, and a strip of land along one side of every lateral thirty feet in width, all of which strips of land may be used for an open roadway

or other useful purpose.

X.

IT IS FURTHER AGREED, that each and every of the terms and conditions herein expressed shall extend to and be binding upon the successors and assigns of the Company, and upon the heirs, legal representatives, successors or assigns of the purchaser. It is agreed between the parties hereto, that when the said purchaser shall have complied with all the conditions contained herein, and shall have completed all payments as herein provided, then this deed shall give a clear and unincumbered perpetual right to the purchaser for the shares of water herein described, and thereupon the Company agrees to acknowledge the full payment and performance of purchaser, and to satisfy and discharge, in the manner provided by law, the lien herein created. [81]

IN WITNESS WHEREOF, the parties hereto have set their hands and seals in duplicate this 8th day of December, A. D. 1906.

AMERICAN FALLS CANAL & POWER CO.

By F. A. SWEET,

Vice-President.

[Seal]

J. R. SHRECK,

Secretary.

T. E. FITZGERALD,

Purchaser.

Signed, sealed and delivered by said corporation in the presence of

NORA M. JONES,

---

Witnesses.

State of Idaho,  
County of Bannock,—ss.

On this 4th day of March, in the year 1907, before me, Nora M. Jones, a Notary Public in and for the County of Bannock, State of Idaho, personally appeared J. R. Shreck, known to me to be the Secretary of the corporation that executed the instrument and acknowledged to me that such corporation executed the same.

[Seal]

NORA M. JONES,  
Notary Public. [82]

**Exhibit "C" [to Petition for Determination and Adjudication of Controversies, etc.—Letter, November 28, 1910, American Falls Co. to Board of Land Commissioners].**

EXHIBIT "C."

GENERAL OFFICE:

AMERICAN FALLS CANAL & POWER  
COMPANY.

Aberdeen, Idaho, November 28, 1910.

Hon. Board of Land Commissioners,  
Boise, Idaho.

Gentlemen:—

In accordance with the provisions contained in Section 12 of a certain contract between the State of Idaho, as the party of the first part, and the American Falls Canal & Power Company as the party of the second part, dated February 23, 1901, the said party of the second part elects to transfer the control and management of said canal system to the owners and holders of water rights thereunder, as



therein provided, reserving the right to sell balance of unsold water rights.

The party of the second part desires to submit to your honorable body at this time, that the provisions of the aforesaid contract have been complied with, canals and laterals constructed and lands in Idaho segregated lists Nos. 1 and 2 and 1 and 24, have been properly reclaimed; that on June 13, 1910, a meeting of the water users under the system of the American Falls Canal & Power Company was held at Aberdeen, Idaho, at which time a corporation was formed and articles adopted, said corporation to be known as the Aberdeen-Springfield Canal Company, said company appointing at said meeting a committee consisting of Arthur J. Snyder, Paul A. Fugate and F. A. Sweet, to act in connection with D. H. Blossom and the State Engineer, in making an examination of the system and report at a future meeting.

The said examination was made and a report submitted at a meeting of the stockholders of the Aberdeen-Springfield Canal Company, held at Aberdeen, Idaho, October 15, 1910, at which [83] meeting 30,215 shares out of a possible 44,000 shares were represented; that said report was adopted by a vote of 27,500 shares and a resolution adopted to the effect that the Aberdeen-Springfield Canal Company accept the canal subject to the report of the committee, only 120 shares voting against, a copy of said report and resolution being attached hereto, as well as a copy of a resolution passed by the Board of Directors of the said Aberdeen-Springfield Canal

Company November 26, 1910, requesting your honorable body to formally accept the system, as now completed and transfer the control and management to said corporation.

That at the present time 51,831.42 shares of water rights have been sold and 44,948.05 shares of stock have been accepted in the Aberdeen-Springfield Canal Company.

We, therefore, respectfully request that the proper action be taken by your honorable body to relieve the American Falls Canal & Power Company, the party of the second part in first-mentioned contract, from any further obligation, as regards canal construction and reclamation of the land, and that their bond for the proper fulfillment of this contract, now on file with the State, be released and that the Aberdeen-Springfield Canal Company be notified of such action. Your prompt and immediate action in this matter will be greatly appreciated by the undersigned.

AMERICAN FALLS CANAL & POWER CO.

By GLENN R. BOTHWELL,

President. [84]

State of Idaho,

County of Ada,—ss.

I, N. Jenness, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the foregoing is a full, true and correct copy of correspondence from the American Falls Canal & Power Company, dated November 28, 1910, as is on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the State Board of Land Commissioners this fifth day of August, 1913.

[Seal]

N. JENNESS,

Register. [85]

**Exhibit "D" [to Petition for Determination and Adjudication of Controversies, etc.—Report].**

**EXHIBIT "D."**

Aberdeen, Idaho, September 21, 1910.

We, your committee appointed to go over and inspect the American Falls Canal & Power Company's irrigation system in company with the State Engineer of Idaho and D. H. Blossom, General Manager of the American Falls Canal & Power Company, in order to ascertain what remains to be done to complete said canal system in a satisfactory manner for turning over to the water users or their legal representative, the Aberdeen and Springfield Canal Company report, as follows:

1.

That the American Falls Canal & Power Company raise and widen that portion of the canal bank on the east side of the canal between the river head-gate and the first wasteway, said bank being just above the wasteway and the part needing such repairs being for a distance of about five hundred feet.

2.

That said American Falls Canal & Power Company should deepen and widen the canal between stations 226 and 258, which will necessitate the removal of about 12,000 cubic yards of gravel.



## 3.

The bents or supports under Lava Slide Canal Company's flume should be taken out and reconstructed in such a manner as to minimize the obstruction of water in the American Falls Canal.

## 4.

That a new crossing be constructed at the point where the American Falls Canal crosses over the People's canal the second time; that said crossing be of concrete or cement and stone, or both, and that the same be upon the principle of an inverted siphon.  
[86]

## 5.

That the south bank of the canal be repaired and reconstructed at all points where necessary, between the third crossing of the People's canal with the American Falls Canal and a point below, opposite the place where the People's canal leaves the American Falls Canal.

## 6.

That the rock obstruction in the canal in Watt's field be removed.

## 7.

That the grade in Watt's basin lateral be made uniform by leaving main canal at present elevation and giving said lateral a fall of .75 per 5,000 feet.

## 8.

That Springfield townsite lateral No. 2 be completed at the upper end to correspond with the balance of said lateral.

## 9.

That Springfield townsite lateral No. 1 just above

the Stowell Fill be enlarged to correspond to the carrying capacity of the balance of the lateral below that point.

10.

That the south side of the Hilton Fill be raised, if found too low, so its carrying capacity be equal to that of the canal immediately below that point.

11.

That the Rabbit brush flat lateral for a short distance below the headgate be repaired and raised if necessary.

12.

That check-gate near Amzi Schreck's place be replaced in a substantial and satisfactory manner.

13.

That a corrugated iron tile 24" in diameter be placed for drainage near Jacob Deuels place.

(Signed.) ARTHUR J. SNYDER.

“ PAUL A. FUGATE.

“ F. A. SWEET. [87]

**Exhibit “E” [to Petition for Determination and Adjudication of Controversies, etc.—Resolution].**

**EXHIBIT “E.”**

**ABERDEEN SPRINGFIELD CANAL CO.,  
ABERDEEN, IDAHO.**

WHEREAS, a large portion of the work of completing the canal system in accordance with the report of the examining committee adopted at a meeting of the stockholders of the Aberdeen-Springfield Canal Company held October 15th, 1910, has been completed, and,

WHEREAS, the balance of the work is progressing satisfactorily and the American Falls Canal & Power Company have furnished a bond in the amount of Ten Thousand Dollars, said bond being satisfactory to the Board of Directors of the Aberdeen-Springfield Canal Company for the full completion of the work specified in above mentioned report on or before April 1, 1911.

THEREFORE, BE IT RESOLVED that we hereby request the State Board of Land Commissioners for the State of Idaho to accept the canal system as completed and formally designate the Aberdeen-Springfield Canal Company as the legal owners of said system.

We hereby certify that the above resolution was adopted at a regular meeting of the Board of Directors of the Aberdeen-Springfield Canal Co., held at Aberdeen, Idaho, Nov. 16th, 1910.

ARTHUR J. SNYDER,

Pres.

NORA M. JONES,

Secty.

Rec'd and filed, November 20, 1910.

N. JENNESS,

Register. [88]



**Exhibit "F" [to Petition for Determination and Adjudication of Controversies, etc.—Letter, December 2, 1910, State Engineer to State Board of Land Commissioners].**

**EXHIBIT "F."**

**STATE OF IDAHO.**

**Engineering Department.**

**Boise.**

**Dec. 2, 1910.**

**State Board of Land Commissioners,  
State Capitol Building,  
Boise, Idaho.**

**Gentlemen:—**

In the matter of the petition of the American Falls Canal & Power Company, and of the Springfield-Aberdeen Canal Company, relative to turning over the canal system known as the American Falls Project, I beg leave to state that from the 18th to the 21st of September, in company with Mr. D. H. Blossom, General Manager of the American Falls Canal & Power Company, and the committee of three appointed by the Settlers Associations to inspect the canal system with reference to its completion, I inspected the above-mentioned system and also advised the committees in regard to certain matters pertaining to the turning over of the works to the settlers, and the committee found the system to be incomplete in thirteen particulars; all of which are recited at length in the above-mentioned petition. With the matters contained in the report taken care of, I believe the system to be reasonably well constructed, and that

the American Falls Canal & Power Company should be relieved of further responsibility in so far as construction matters are concerned. I fully agree with the report of the committee, and if it is the desire of the settlers, as set out in the petition, to accept the canal as constructed, permission on the part of the Board, if such is necessary, should not be withheld. However, if it is proper, I would recommend that these people take the necessary steps to organize themselves into an Irrigation District, under our irrigation district laws, at as [89] early a date as convenient, for the reason that under such an arrangement the necessities of the district can be better and more readily taken care of.

Respectfully submitted,

(Signed) D. G. MARTIN,

State Engineer.

State of Idaho,

County of Ada,—ss.

I, N. Jenness, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the foregoing is a full, true and correct copy of a report of the State Engineer, dated December 2, 1910, as is on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the State Board of Land Commissioners this eighth day of August, 1913.

[Seal]

N. JENNESS,

Register, [90]

**Exhibit "G" [to Petition for Determination and Adjudication of Controversies, etc.—Extract from Minutes].**

**EXHIBIT "G."**

**EXTRACT FROM MINUTES OF A MEETING  
OF THE STATE BOARD OF LAND COM-  
MISSIONERS, HELD DECEMBER 1, 1910.**

In the matter of the application of the Aberdeen-Springfield Canal Company, and the American Falls Canal & Power Company, asking that the canal system, constructed by the American Falls Canal & Power Company be turned over to the Aberdeen-Springfield Canal Company, a corporation organized by the settlers upon the American Falls Carey project, the following resolution was unanimously adopted:

It appearing to the Board that the Settlers Company have by a resolution, appointed its committee to make an examination of the condition of its canals and specified wherein the same was defective, and it further appearing that the said construction company have satisfied and complied with the requirements of said committee in that respect, and that the settlers in the main, under said project, are now desirous of taking over the management and control of the said canal system, and that the said stockholders of said corporation have voted to take over the control and operation of said system, and the Board now being advised in the premises, it is hereby ordered that upon the filing of a report of the State Engineer, agreeing with the report of said committee



as to the condition of the canal system, that the canal system be transferred from the said construction company to the said operating company for control and operation.

The intention of the within transfer is in no way to alter or change the original terms of the contract between the State of Idaho and the American Falls Canal & Power Company, except as to *construction completion* of the canal and operation of [91] same and must be understood to in no way relieve the American Falls Canal & Power Company from any other obligations provided in said original contract, and the laws of the State.

And it appearing to the Board and the said construction company has executed to each of the settlers under said contract, a warranty deed for water right, and a proportionate interest in the canal system, it is especially understood that this resolution does not attempt to construe the rights of the settlers under said deed, nor limit or modify in any respect the liability of the said construction company or the rights of the settlers thereunder.

State of Idaho,

County of Ada,—ss.

I, N. Jenness, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the foregoing is a full, true and correct copy of an extract from the minutes of the State Board of Land Commissioners dated December 1, 1910, as is on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the State Board of Land

Commissioners this fifth day of August, 1913.

[Seal]

N. JENNESS,  
Register. [92]

**Exhibit "H" [to Petition for Determination and  
Adjudication of Controversies, etc.—Agreement  
to Accept Certain Payments, etc.].**

**EXHIBIT "H."**

Salt Lake City, Utah, Nov. 9, 1909.

The American Falls Canal & Power Company hereby agrees to accept, from Mrs. T. E. Fitzgerald the following payments in full settlement of all payments called for on her contract to purchase water right:

Payment	on	Contract	due	Dec. 1907—Payable	Dec. 1909.....	\$531.20
"	"	"	"	" 1908	" "	1910..... 627.52
"	"	"	"	" 1909	" "	1911..... 602.08
"	"	"	"	" 1910	" "	1912..... 576.44
"	"	"	"	" 1911	" "	1913..... 551.20
"	"	"	"	" 1912	" "	1914..... 525.76
"	"	"	"	" 1913	" "	1915..... 500.32
"	"	"	"	" 1914	" "	1916..... 474.88
"	"	"	"	" 1915	" "	1917..... 449.44

This extension is made on account of Mrs. T. E. Fitzgerald releasing the Company from any and all claims for damage arising from any failure on their part to perform any of the conditions of the above mentioned contract, to this date.

**AMERICAN FALLS CANAL & POWER  
COMPANY.**

By G. R. BOTHWELL,  
President.

I accept above and agree to make payments as above provided, together with interest if not paid

when due, from maturity.

Mrs. T. E. FITZGERALD,

Per T. E. FITZGERALD,

Her Attorney-in-Fact. [93]

*In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for the County of  
Power.*

W. A. WEST,

Plaintiff,

vs.

AMERICAN FALLS CANAL & POWER COM-  
PANY, a Corporation,

Defendant.

**Summons [in State Court in West vs. American  
Falls Co.].**

THE STATE OF IDAHO Sends Greeting to the  
Above-named Defendant.

YOU ARE HEREBY REQUIRED TO AP-  
PEAR in an action brought against you by the  
above-named plaintiff in the District Court of the  
Fifth Judicial District, State of Idaho, in and for the  
County of Power, and to answer the complaint filed  
therein (a copy of which is hereto attached) within  
twenty days (exclusive of the day of service) after  
the service on you of this summons, if served within  
this district; or if served out of this district, within  
forty days.

AND YOU ARE HEREBY NOTIFIED, That if  
you fail to appear and answer the said complaint, as  
above required, the said plaintiff will apply to the  
Court for the relief demanded in said complaint.



GIVEN under my hand and the seal of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, this 22d day of March, in the year of our Lord one thousand nine hundred and thirteen.

[District Court Seal]      DAVIS BURRELL,  
Clerk.

GARLAND DRAPER,  
SULLIVAN & SULLIVAN,  
Attys. for Plaintiff,  
Res. Boise, Idaho. [94]

*In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for Power County.*

W. A. WEST,  
Plaintiff,

vs.

AMERICAN FALLS CANAL & POWER COM-  
PANY, a Corporation,  
Defendant.

**Complaint [in State Court in West vs. American  
Falls Co.].**

The plaintiff complains of the defendant and for a cause of action herein alleges:

I.

That the defendant is now, and during all of the times hereinafter mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business in the State of Idaho, with its principal place of business therein in Bingham County, Idaho.

II.

That in the month of January, 1906, said plaintiff

made entry under the homestead laws of the United States of the following described tract of land:

The west half of the southeast quarter and Lots Two, Three and Four of Section 25, Township 7 South, Range 30 E., B. M., containing 170 acres, more or less, in Blaine County, now Power County, Idaho. That he is now and has at all times mentioned herein since said day been duly seized and in possession and entitled to the possession of said premises and the whole thereof, and his title thereto was perfected by a full compliance with the laws of the United States and the rules and regulations of the General Land Office of the United States pertaining to entries of Homestead, and that during the summer of 1912 patent issued by the United States of [95] America, giving and granting him absolute title to said tract of land.

### III.

That on the 8th day of December, 1906, for and in consideration of the sum of \$4,000.00, to be paid in ten installments, the receipt of the first of which, a cash payment of \$480.00, being thereby acknowledged, the said American Falls Canal & Power Company made, executed and delivered to said plaintiff its certain warranty deed in writing, a copy of which is hereto attached, marked Exhibit "A" and by this reference made a part hereof.

### IV.

That immediately prior to the planting of the crops and trees in each of the years 1907, 1908, 1909 and 1910, as more particularly hereinafter set forth, and prior to the opening of the irrigation season of

each of said years said defendant notified this plaintiff that water would be ready for delivery through its irrigation works for use on said land, in accordance with the terms of said Water Deed, in amounts sufficient for the proper irrigation of said crops and trees during the irrigation season of each of said years; that said defendant company intended and expected that plaintiff would rely upon said notices and be induced thereby to believe that water would be ready for use on his said land and that said company would comply with its said contracts and furnish and deliver the same.

V.

That the plaintiff, believing that the defendant would be ready to deliver water during the irrigation season of each of said years 1908, 1909 and 1910, in accordance with said water deed and the notices as aforesaid, and that he would be able to secure same for the proper irrigation of said tract of land, and fully expecting that said defendant company would furnish, deliver, carry and make available, ample water for the irrigation of his said lands for said crops during said seasons, and relying upon the provisions of said Water Deed and upon the notices aforesaid, he was induced [96] thereby, and did in the year 1908, construct ditches and flumes, leading to and over said lands for the distribution of said water thereon, and thereover, and did during proper planting seasons, as hereafter in this paragraph more particularly set forth, and with the full knowledge, consent and acquiescence of said defendant, plant, seed and set the following crops and trees,



after breaking and preparing the part of said land used therefor, to wit:

- (a) In the Fall of 1907, 80 acres of said land in wheat;
- (b) In the Spring of 1908, ten acres of said land in barley;
- (c) In the Fall of 1908, eighty acres of said land in wheat;
- (d) In the Fall of 1909, eighty acres of said land in wheat;
- (e) In the Spring of 1910, eleven acres of said land in alfalfa;
- (f) In the Spring of 1910, two hundred trees for shade and other purposes over said land.

#### VI.

That prior to the opening of the irrigation season of 1908 said plaintiff constructed the necessary laterals, ditches, flumes, and gates leading from the point at which he was to connect with the said defendant company's irrigation system to and over said land for taking and distributing water thereon, and said plaintiff was ready, willing and fully prepared, and said ditches were properly located, constructed and of sufficient capacity, to receive and distribute the water conveyed under said Water Deed, upon said land and crop during the irrigation season of 1908 and continuously thereafter.

#### VII.

That notwithstanding said Water Deed and the obligations assumed by, and devolving upon said defendant company thereunder and notwithstanding said notices and promises to furnish, carry and

deliver ample water for the proper irrigation of said land during said years, under its said Water Deed, and although there was plenty of water available at the place of diversion, and notwithstanding the [97] fact that said plaintiff had duly and fully performed all the obligations and conditions of said Water Deed to be by said plaintiff performed, said defendant company, with full knowledge of the fact that said plaintiff had relied upon said Water Deed, notices and obligations to furnish water, as aforesaid, and had constructed laterals and ditches to be constructed to and over said land at great expense, and had planted, seeded and set the crops and trees, as aforesaid, and well knowing that the said ditches and flumes would be useless and the sums expended thereon lost to said plaintiff, and that the said crops and trees could not live and thrive unless water was made available for their irrigation from its said canal system, utterly failed, neglected and refused to furnish, carry or deliver, or make available for plaintiff's use, ample water, or any water, for the proper irrigation of said land or the crops and trees planted and growing thereon during said years, as agreed in said Water Deed, and also by said notices, aforesaid, or in any manner at all; and utterly failed, neglected and refused to furnish, any water to be used upon said land or any part thereof, during the irrigation season, that is to say, between the 1st day of April and the 1st day of November of each and every year after the year 1906, and to furnish canals and laterals of a carrying capacity sufficient to deliver water at the rate of  $1/80$  of one second-foot

per acre in main canal, and  $1/50$  of one second-foot per acre, or any water, in the laterals from which said plaintiff was to take water for the irrigation of said land; and utterly failed, neglected and refused, as required by said Water Deed, to carry the amount of water, or any amount of water, to which said plaintiff was and is entitled thereunder for use on said land, through said defendant's canal system and measure and deliver the same at a point within one-half mile of said land where *at* water would be available for distribution and use thereon, but, on the contrary, said defendant carried and delivered some water, not sufficient however to properly irrigate said land, [98] to a point, within one-half of said land but said point was of too low an elevation to allow water to be made available therefrom for distribution or use upon said land, or any part thereof, thus making all of the canal system of said defendant under and below all of said land so as to make it impossible to secure water therefrom at any point within and in accordance with the notices given said plaintiff as aforesaid, said trees would have continued to live and thrive and the yield from said crops would have been as great at least as is usually received from such land well cultivated and supplied with water for irrigation purposes under ordinarily favorably conditions; that upon the failure of said company to supply water as aforesaid, said plaintiff endeavored at various times to preserve and prevent the destruction of said trees and to secure the greatest possible yield from said crops and prevent their absolute waste and destruction, by hauling water for



use in the irrigation thereof from a neighboring stream at a great trouble and expense to himself; and in spite of the use of said water upon said crop and trees and notwithstanding the close care and attention given said crops and trees and the use of said plaintiff's best husbandry and endeavors to secure a sufficient yield therefrom and to preserve and promote the growth thereof, and solely by reason of the failure of defendant to deliver water therefor, as hereinbefore stated, and to do and perform its aforesaid obligations, agreements and duties, the ditches and flumes constructed by said plaintiff as aforesaid, were damaged and destroyed and became useless and valueless to said plaintiff and said crops and trees and the whole thereof were either entirely destroyed and lost to said plaintiff or partially destroyed, injured, stunted and cut short in their growth and yield and failed to mature, as hereinafter more fully appears.

### *IX.*

That the damages occurring to said plaintiff and caused by the foregoing acts of defendant and the breaches aforesaid of the terms and conditions of said Water Deed and notices are as follows: [99]

(a) That said crop of wheat planted in the Fall of 1907, as aforesaid, was injured, stunted and cut short in its growth and failed to mature, all to the damage of said plaintiff in the sum of \$450.00;

(b) That said crop of barley planted in the Spring of 1908, as aforesaid, was injured, stunted and cut short in its growth and failed to mature, all to the damage of said plaintiff in the sum of \$200.00;

(c) That said crop of wheat planted in the Fall of 1908, as aforesaid, was injured, stunted and cut short in its growth and failed to mature, all *the* the damage of said plaintiff in the sum of \$650.00;

(d) That said crop of wheat planted in the Fall of 1909, as aforesaid, was injured, stunted and cut short in its growth and failed to mature, all to the damage of said plaintiff in the sum of \$650.00;

(e) That said crop of alfalfa planted in the Spring of 1910, as aforesaid, was injured, stunted and cut short in its growth and failed to mature, all to the damage of said plaintiff in the sum of \$274.00;

(f) That said 200 shade trees put out and set upon said land in the Spring of 1910, as aforesaid, were totally destroyed and lost to this plaintiff to his damage in the sum of \$275.00;

(g) That said ditches and flumes constructed by plaintiff as aforesaid, were destroyed and made useless and valueless to plaintiff to his damage in the sum of \$500.00.

## X.

That plaintiff's said boundary of land and all of the same lies under the canals, laterals, etc., making up the irrigation system aforesaid, and is now and has been during all the times, mentioned herein susceptible of irrigation from said system; that said tract of land is dry and arid in character and requires the artificial use of water thereon before crops of any kind can be successfully raised; that there is no water of any kind available or obtainable on or near said tract of land which can be utilized for irrigation, [100] cultivation, reclamation or other pur-

poses on said land, other than through said irrigation works, nor has there been during any of the times mentioned herein, all of which said defendant company at all times well knew.

XI.

That at all times herein mentioned said plaintiff has fully and faithfully performed each and every condition and obligation by him to be performed under said Water Deed or otherwise due to said company from said plaintiff in regard to the land and water rights herein mentioned, and he is ready, able and willing to perform each and every condition and obligation to be by him performed thereunder hereafter.

XII.

That at all times herein mentioned for which damage is sought for failure to carry out its said contracts the defendant company was in the possession, ownership and control of the said irrigation works and all thereof.

XIII.

That plaintiff has demanded of defendant, at divers times that said sums of damages be paid, but said defendant refused to pay the same, or any part thereof, and still refuses so to do and there is due the plaintiff from the defendant said sum of \$450.00, with interest thereon at the rate of seven per cent per annum from Oct. 1st, 1908; and the said sum of \$200.00, with interest thereon at the rate of seven per cent per annum from Oct. 1st, 1908; and the said sum of \$650.00, with interest thereon at the rate of seven per cent per annum from Oct. 1st,



1909; and the said sum of \$650.00, with interest thereon at the rate of seven per cent per annum from Oct. 1st, 1910; and the said sum of \$274.00, with interest thereon at the rate of seven per cent per annum from Oct. 1st, 1910; and the said sum of \$275.00, with interest thereon at the rate of seven per [101] cent per annum from Oct. 1st, 1910; and the said sum of \$500.00, with interest thereon at the rate of seven per cent per annum from Oct. 1st, 1908.

WHEREFORE, plaintiff demands judgment against said defendant for the said sums of \$450.00, \$200.00, \$650.00, \$650.00, \$274.00, \$275.00, and \$500.00, or the aggregate sum of \$2,999.00, together with the interest due upon the respective sums making up said \$2,999.00 aggregate from the dates and at the rate specified in paragraph XIII hereof; for his costs of suit, and such other and further relief as may be just and equitable in the premises.

GARLAND DRAPER,  
SULLIVAN & SULLIVAN,  
All Residing at Boise, Idaho,  
Attorneys for Plaintiff.

State of Idaho,  
County of Ada,—ss.

W. E. Sullivan, being first duly sworn, on oath says: That he is one of the attorneys of the plaintiff in the above-entitled cause and of the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof and believes the facts therein stated to be true, and affiant further says that said plaintiff is absent from the

county where his attorneys reside, and for that reason the complaint herein is not verified by said plaintiff, but by one of his said attorneys.

W. E. SULLIVAN.

Subscribed and sworn to before me this 11th day of March, 1913.

[Seal]

HARRY C. WYMAN,  
Notary Public. [102]

**Exhibit "J" [Summons in State Court in Fitzgerald  
vs. American Falls Co., etc.].**

**EXHIBIT "J."**

*In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for the County of  
Power.*

MARY A. FITZGERALD,

Plaintiff,

vs.

AMERICAN FALLS CANAL & POWER COM-  
PANY, a Corporation,

Defendant.

THE STATE OF IDAHO Sends Greeting to the  
Above-named Defendant.

YOU ARE HEREBY REQUIRED TO AP-  
PEAR in an action brought against you by the  
above-named plaintiff in the District Court of the  
Fifth Judicial District, State of Idaho, in and for  
the County of Power, and to answer the complaint  
filed therein (a copy of which is hereto attached)  
within twenty days (exclusive of the day of service)

after the service on you of this summons, if served within this district; or if served out of this district, within forty days.

AND YOU ARE HEREBY NOTIFIED, that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the Court for the relief demanded in said complaint.

GIVEN under my hand and the seal of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power this 22d day of March, in the year of our Lord one thousand nine hundred and thirteen.

[District Court Seal] DAVID BURRELL,  
Clerk.

GARLAND DRAPER,  
SULLIVAN & SULLIVAN,  
Attys. for Plaintiff,  
Res. Boise, Idaho. [103]

*In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for Power County.*

MARY A. FITZGERALD,  
Plaintiff,

vs.

AMERICAN FALLS CANAL & POWER COM-  
PANY, a Corporation,  
Defendant.

**Complaint [in State Court in Fitzgerald vs. Ameri-  
can Falls Co.].**

The plaintiff complains of the defendant and for cause of action alleges:



## I.

That the defendant is now, and during all the times hereinafter mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business in the State of Idaho, with its principal place of business therein in Bingham County, Idaho.

## II.

That on April —, 1906, one E. J. Toumy made entry, under the Desert Land laws of the United States, of the following described tract of land, to wit:

W.1/2 of the NE.1/4, and Lot 1, Sec. 25, Twp. 7 S., R. 30 E., and Lot 11 of Sec. 19, and Lots 6 and 7 of Sec. 30, both in Twp. 7 S., R. 31 E., B. M., Blaine County, Idaho, now Power County.

That in August, 1906, said Toumy duly assigned all his right, title and interest in and to said premises to said plaintiff, and she became the lawful possessor and owner of said premises in accordance with the provisions of said Desert Land Law and has been during all the times mentioned herein in possession and entitled to the possession thereof; that in June, 1912, patent to said premises and the whole thereof from the United States of America was executed and delivered to said plaintiff. [104]

## III.

That on the 8th day of December, 1906, for and in consideration of the sum of \$4,000.00, to be paid in ten installments, the receipt of the first of which, a cash payment of \$480.00, being thereby acknowledged, the said American Falls Canal & Power Com-

pany made, executed and delivered to T. E. Fitzgerald its certain warranty deed in writing, a copy of which is hereto attached, marked Exhibit "A" and by this reference made a part hereof, which deed was on Sept. 3, 1907, duly assigned to this plaintiff, who, during all times mentioned herein, was the owner and holder thereof.

#### IV.

That immediately prior to the planting of the crops and trees in each of the years 1909, 1910, and 1911 and 1912, as more particularly hereinafter set forth, and prior to the opening of the irrigation season of each of said years, said defendant notified this plaintiff that water would be ready for delivery through its irrigation works for use on said land, in accordance with the terms of said Water Deed, in amounts sufficient for the proper irrigation of said crops and trees during the irrigation season of each of said years. That said defendant company intended and expected that plaintiff would rely upon said notices and be induced thereby to believe that the water would be ready for use on her said land, and that said company would comply with its said contracts and furnish and deliver the same.

#### V.

That the plaintiff, believing that the defendant would be ready to deliver water during the irrigation season of each of said years 1909, 1910, 1911 and 1912, in accordance with said Water Deed and the notices as aforesaid, and that she would be able to secure same for the proper irrigation of said tract of land,

and fully expecting said defendant company would furnish, deliver, carry and make available ample water for the irrigation of her said lands [105] for said crops during said seasons, and relying upon the provisions of said Water Deed and upon the notices aforesaid, she was induced thereby, and did in the year 1908 construct ditches and flumes, leading to and over said lands for the distribution of said water thereon and thereover, and did during proper planting seasons, as hereafter in this paragraph and more particularly set forth, and with the full knowledge and acquiescence of said defendant, after breaking and preparing the part of said land used therefor, plant, seed and set the following crops and trees, to wit:

(a) In the spring of 1909, 306 fruit trees on six acres of said land, consisting of apple, plum, cherry and pear trees;

(b) In the fall of 1909, 71 acres of said land in wheat;

(c) In the summer of 1909, 1 acre in vegetables and garden stuff;

(d) In the spring of 1910, 100 shade trees over said land;

(e) In the spring of 1910, 16 acres of said land in oats;

(f) In the spring of 1911, 11 acres of said land in oats;

(g) In the spring of 1912, 10 acres of said land in potatoes.

## VI.

That prior to the opening of the irrigation sea-



son of 1908 said plaintiff constructed the necessary laterals, ditches, flumes and gates leading from the point at which she was to connect with the said defendant company's irrigation system to and over said land for taking and distributing water thereon, and said plaintiff was ready, willing and fully prepared, and said ditches were properly located, constructed and of sufficient capacity, to receive and distribute the water conveyed under said Water Deed, upon said land and crop during the irrigation season of 1908 and continuously thereafter.

## VII.

That notwithstanding said Water Deed and the obligations assumed by and devolving upon said defendant company thereunder, [106] and notwithstanding said notices and promises to furnish, carry and deliver ample water for the proper irrigation of said land during said years, under its said Water Deed, and although there was plenty of water available at the place of diversion, and notwithstanding the fact that said plaintiff had duly and fully performed all the obligations and conditions of said Water Deed to be by said plaintiff performed, said defendant company, with full knowledge of the fact that said plaintiff had relied upon said Water Deed, notices and obligations to furnish water, as aforesaid, and had constructed laterals and ditches to be constructed to and over said land at great expense, and had planted, seeded and set the crops and trees, as aforesaid, and well knowing that the said ditches and flumes would be useless and the sums expended thereon lost to said plain-

tiff, and that the said crops and trees could not live and thrive unless water was made available for their irrigation from its said canal system, utterly failed, neglected and refused to furnish, carry or deliver, or make available for plaintiff's use, ample water, or any water, for the proper irrigation of said land or the crops and trees growing thereon during said years, as agreed in said Water Deed, and also by said notices, aforesaid, or in any manner at all; and utterly failed, neglected and refused to furnish any water to be used upon said land, or any part thereof, during the irrigation season, that is to say, between the 1st day of April and the 1st day of November, of each and every year after the year 1906, and to furnish canals and laterals of a carrying capacity sufficient to deliver water at the rate of  $1/80$  of one second-foot per acre in main canal, and  $1/50$  of one second-foot per acre, or any water, in the laterals from which said plaintiff was to take water for the irrigation of said land; and utterly failed, neglected and refused, as required by said Water Deed, to carry the amount of water or any amount of water, to which said plaintiff was and is entitled thereunder for use on said land, [107] through said defendant's canal system and measure and deliver the same at a point within one-half mile of said land where the water would be available for distribution and use thereon, but, on the contrary, said defendant carried and delivered some water, not sufficient, however, to properly irrigate said land, to a point, within one-half mile of said land, but said point was of too low an elevation to allow water to be distributed



therefrom over said land, or any part thereof, thus making all of the canal system of said defendant under and below all of said land so as to make it impossible to secure water therefrom at any point within one-half mile of said land, for the irrigation thereof; and did utterly fail, neglect and refuse to so locate and construct its irrigation system in such manner and of such capacity that ample water for the proper irrigation of said land, and the crops and trees aforesaid planted and growing thereon, could be carried or furnished or delivered or made available for use on said land, or any part thereof, during all of said irrigation seasons, or any part thereof, in accordance with its obligations under said Water Deed, but on the contrary constructed the canals and laterals of said system, and especially the lateral leading to within one-half mile of said land, in such a manner that the said lateral and all points of the same within one-half mile of said land is below the point where it is necessary for said plaintiff to take the water from said lateral for distribution and use upon her said land and each part of the same, thus making all of said lateral over a course and grade that is too low to permit of the distribution of water therefrom over and upon said land or any part thereof, and by reason of so constructing its said canals and laterals said plaintiff found it impossible to take and distribute water therefrom over said land, or any part thereof, for irrigation purposes or any purposes; and said defendant company did utterly fail, neglect and refuse to so maintain and keep its said canals and laterals in proper condition



and repair, but on the contrary maintained [108] its said lateral constructed as aforesaid to within a point one-half mile of said land, in such a manner that the same was filled with sand and obstructed thereby, and the banks thereof broken and washed out and that the drops in said lateral are so located on curves therein to cause the water to wash and destroy the banks and the bottom thereof, and the banks so maintained that there were at all times low points in the banks and high points in the bottom thereof, all making it impossible for any water to be carried or conveyed or delivered through the same to the end of the lateral or to any point within one-half mile of said land, or so that water could be carried or delivered or made available through said system for the proper irrigation, or any irrigation of said land or any part thereof, or the crops or trees planted and growing thereon; that said defendant company with a full knowledge at all times of said conditions, failed and refused *to refused* to remedy the defects in the lateral locations and construction and maintenance thereof and failed, neglected and refused, and still fails, neglects and refuses to relocate or reconstruct or remedy in any way the defective and improperly located and constructed parts of the canal and irrigation system aforesaid, or to repair and maintain the same, or to carry and deliver said water as it agreed to do under said Water Deed, whereby said plaintiff was during all the times herein mentioned and still is deprived of the water supply to which she is entitled for said land as aforesaid, although said defendant, at divers times during each

of said years, in response to the requests and demands of said plaintiff, repeatedly promises and agreed so to do.

### VIII.

That said plaintiff caused due care and attention to be given the crops and trees aforesaid and all of the same, and used good and sufficient husbandry in the planting, care and cultivation thereof, and said crops and trees lived and thrived until the period [109] of the various years at which the artificial application of water for irrigation purposes became necessary to their existence, and had water been available at the necessary times during the irrigation seasons following the planting of the crops and trees aforesaid and at the times and in the quantities and amounts to which said plaintiff was entitled under said Water Deed, and which said defendant company had obligated itself to supply and deliver as aforesaid and as promised and in accordance with the notices given said plaintiff as aforesaid, said trees would have continued to live and thrive and the yield from said crops would have been as great at least as is usually received from such land well cultivated and supplied with water for irrigation purposes under ordinarily favorable conditions; that upon the failure of said company to supply water as aforesaid, said plaintiff endeavored at various times to preserve and prevent the destruction of said trees and to secure the greatest possible yield from said crops and prevent their absolute waste and destruction, by hauling water for use in the irrigation thereof from a neighboring stream at great trouble



and expense to herself; and in spite of the use of said water upon said crops and trees and notwithstanding the close care and attention given said crops and trees and the use of said plaintiff's best husbandry and endeavors to secure a sufficient yield therefrom and to preserve and promote the growth thereof, and solely by reason of the failure of defendant to deliver water therefor, as hereinbefore stated, and to do and perform its aforesaid obligations, agreements and duties, the ditches and flumes constructed by said plaintiff as aforesaid, were damaged and destroyed and became useless and valueless to said plaintiff and said crops and trees and the whole thereof were either entirely destroyed and lost to said plaintiff or partially destroyed, injured, stunted and cut short in their growth and yield and failed to mature, as hereinafter more fully appears. [110]

### IX.

That the damages occurring to plaintiff and caused by the foregoing acts of defendant and the breaches aforesaid of the terms and conditions of said Water Deed and notices are as follows:

(a) That the said 306 apple, plum, cherry and pear trees put out and set upon said land in the Spring of 1909 were totally destroyed and lost to the plaintiff, to her damage in the sum of \$649.00;

(b) That the said crop of 71 acres of wheat planted on said land in the Fall of 1909 failed to mature and was injured, stunted and cut short in its growth, all to the damage of said plaintiff in the sum of \$700.00;



(c) That the said vegetables and garden stuff planted on 1 acre of said land in the Summer of 1909 was injured, stunted and cut short in its growth and production, in a manner to render the same valueless, all to the damage of said plaintiff in the sum of \$100.00;

(d) That the said 100 shade trees put out and set upon said land in the Spring of 1910 were totally destroyed and lost to this plaintiff, to her damage in the sum of \$100.00;

(e) That the said crop of 16 acres planted to oats in the Spring of 1910, failed to mature and was injured, stunted and cut short in its growth and production, all to the damage of said plaintiff in the sum of \$200.00;

(f) That the said crop of 11 acres planted to oats in the Spring of 1911 failed to mature and was injured, stunted and cut short in its growth, all to the damage of said plaintiff in the sum of \$150.00;

(g) That the said crop of potatoes planted on 10 acres of said land in the Spring of 1912, failed to mature and was injured, stunted and cut short in its growth and production, all to the damage of said plaintiff in the sum of \$600.00; [111]

(h) That said ditches and flumes constructed by plaintiff, as aforesaid, were destroyed and made useless and valueless to plaintiff and the sums expended thereon lost to plaintiff, all to her damage in the sum of \$500.00.

## X.

That plaintiff's said boundary of land and all of the same lies under the canals, laterals, etc., making

up the irrigation system aforesaid, and is now, and has been during all the times mentioned herein susceptible of irrigation from said system; that said tract of land is dry and arid in character and requires the artificial use of water thereon before crops of any kind can be successfully raised; that there is no water of any kind available or obtainable on or near said tract of land which can be utilized for irrigation, cultivation, reclamation or other purposes on said land, other than through said irrigation works, nor has there been during any of the times mentioned herein, all of which said defendant company at all times well knew.

XI.

That at all times herein mentioned said plaintiff and her said assignor have fully and faithfully performed each and every condition and obligation by them to be performed under said Water Deed or otherwise due to said company from said plaintiff or her said assignor in regard to the land and water rights herein mentioned, and she is ready, able and willing to perform each and every condition and obligation to be by her performed thereunder hereafter.

XII.

That at all times herein mentioned up to about the 1st of May, 1911, said defendant company was in the possession, ownership and control of said irrigation works and all thereof; that as plaintiff is informed and believes, said defendant company, some time in the Spring or early Summer of the year 1911, made [112] some sort of a pretended or colorable transfer of the management of said irrigation system to



a corporation known as the Aberdeen-Springfield Canal Company, and thereafter up to the present time said Aberdeen-Springfield Canal Company has managed said irrigation works; that at the time of said pretended transfer the canals and laterals of said system, and especially the lateral which leads to within one-half mile of said land, as aforesaid, were and are now in the same defective condition as hereinbefore set forth, so that water could not, during said time, be distributed therefrom to and over any of said land in accordance with said Water Deed; and notwithstanding said pretended transfer, it was the duty of said defendant company to so remedy its said defectively constructed laterals and maintain the same in a proper manner and see that the plaintiff herein could and would receive the amount of water for her said land which said defendant had agreed to carry and deliver, as set forth in said Water Deed; and this plaintiff further alleges that said defendant company even after making said pretended transfer, as aforesaid, repeatedly promised this plaintiff prior to the planting of each of the crops during the years 1911 and 1912, as aforesaid, and agreed, that it would carry and deliver to plaintiff as it had agreed to do in said Water Deed, and relocate and reconstruct said canal leading to within one-half mile of said land, as aforesaid, and maintain the same, so that this plaintiff would and could receive the water to which she was entitled under said Water Deed, for use on said land and for said crops, and relying upon such promises and such agreements of said defendant to comply with and carry



out the provisions of said Water Deed, plaintiff planted said crops during said years believing that she would receive water therefor, but said defendant utterly failed, neglected and refused to so relocate and reconstruct and maintain said lateral so that plaintiff could receive any water therefrom for use on said land, under said Water Deed, to her damage as hereinbefore set forth; that [113] during the years 1911 and 1912, said defendant through its ownership and control of practically all of the stock of said Aberdeen-Springfield Canal Company controlled said company, and through said company selected and controlled its officers and directed all of its acts, and through said company controlled and operated and managed the said irrigation system.

### XIII.

That plaintiff has demanded of defendant at divers times that said sums of damage be paid, but said defendant refused to pay the same or any part thereof, and still refuses so to do, and there is due the plaintiff from the defendant said sum of \$649.00, with interest thereon at the rate of seven per cent per annum from October 1st, 1909; and the said sum of \$700.00, with interest thereon at the rate of seven per cent per annum from October 1st, 1910; and the said sum of \$100.00, with interest thereon at the rate of seven per cent per annum from October 1st, 1909; and the said sum of \$100.00, with interest thereon at the rate of seven per cent per annum from October 1st, 1911; and the said sum of \$200.00, with interest at the rate of seven per cent per annum from October 1st, 1910; and the said sum of \$150.00, with interest at

the rate of seven per cent per annum from October 1st, 1911; and the said sum of \$600.00, with interest thereon at the rate of seven per cent per annum from October 1st, 1912; and the said sum of \$500.00, with interest thereon at the rate of seven per cent per annum from October 1st, 1911.

WHEREFORE, plaintiff demands judgment against said defendant for the said sums of \$649.00, \$700.00, \$100.00, \$100.00, \$200.00, \$150.00, \$600.00, and \$500.00, or the aggregate sum of \$2999.00, together with interest due upon the respective sums making up said \$2999.00, from the dates and at the rate specified in paragraph XIII hereof; for her costs of suit, and such other and further relief as may be just and equitable in the premises.

GARLAND DRAPER, [114]

SULLIVAN & SULLIVAN,

All Residing at Boise, Idaho, Attorneys for Plaintiff.

State of Idaho,

County of Ada,—ss.

W. E. Sullivan, being first duly sworn, on oath says: That he is one of the attorneys of the plaintiff in the above-entitled cause and of the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof and believes the facts stated therein to be true, and affiant further says that said plaintiff is absent from the county where her attorneys reside, and for that reason the complaint herein is not verified by said plaintiff, but by one of her said attorneys.

W. E. SULLIVAN.

Subscribed and sworn to before me this 11th day of March, 1913.

[Seal]

HARRY C. WYMAN,  
Notary Public. [115]

**Exhibit "K" [Summons in State Court in Fitzgerald et al. vs. American Falls Co., etc.].**

**EXHIBIT "K."**

*In the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County.*

T. E. FITZGERALD and W. A. WEST,  
Plaintiffs,

vs.

AMERICAN FALLS CANAL & POWER COMPANY, a Corporation,

Defendant.

THE STATE OF IDAHO Sends Greeting to  
American Falls Canal & Power Company, the  
Above-named Defendant:

You are hereby notified that a complaint has been filed against you in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, by the above-named plaintiffs, and you are hereby directed to appear and answer the said complaint within twenty days of the service of this summons if served within said Judicial District, and within forty days if served elsewhere; and you are further notified that unless you so appear and answer said complaint within the time herein specified, the plaintiffs will take judgment against you as prayed in said complaint.



WITNESS MY HAND AND THE SEAL of said District Court this 6th day of April, 1914.

[Seal]

PAUL BULFINCH,

Clerk.

BAIRD & DAVIS,

Residence: American Falls, Idaho,

SULLIVAN & SULLIVAN,

Residence: Boise, Idaho,

Attorneys for Plaintiffs. [116]

District Court, Fifth Judicial District, State of Idaho. T. E. Fitzgerald and W. A. West, Plaintiffs, vs. American Falls Canal & Power Company, a Corporation, Defendant. Complaint. Filed April 6th, 1914, at 9:10 o'clock A. M. Paul Bulfinch, Clerk. Baird & Davis, Residence: American Falls, Idaho, Sullivan & Sullivan, Residence: Boise, Idaho, Attorneys for Plaintiffs. [117]

*In the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County.*

T. E. FITZGERALD and W. A. WEST,

Plaintiffs,

vs.

AMERICAN FALLS CANAL & POWER COMPANY, a Corporation,

Defendant.

**Complaint [in State Court in Fitzgerald et al. vs. American Falls Co.].**

The plaintiffs complain of the defendant, and for cause of action herein allege:

I.

That the defendant, American Falls Canal & Power

Company, is now, and during all the times herein-after mentioned, has been a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business in Bingham County, Idaho.

## II.

That said defendant is a public service or a *quasi* public corporation, and was organized for the purpose of constructing and building that certain irrigation project and system known as the American Falls Canal & Power Company Project, situate in Bingham and Power (formerly a portion of Blaine and other counties) Counties, State of Idaho, by constructing or causing to be constructed, dams, ditches, conduits, flumes and other means for the purpose of diverting water from Snake River, and for the purpose of selling and transferring water rights therein for irrigation of lands lying under said system and for domestic purposes.

## III.

That on the 8th day of December, 1906, for and in consideration of the sum of \$4,000.00 to be paid in ten installments, receipt of the first of which, a cash payment of \$480.00, being [118] thereby acknowledged, the said American Falls Canal & Power Company made, executed and delivered to plaintiff, T. E. Fitzgerald, its certain warranty deed in writing, conveying a certain water right, a copy of which is hereto attached, marked Exhibit "A," and by this reference made a part hereof; and said complainant is now the owner and holder thereof.

## IV.

That on the 8th day of December, 1906, for and in consideration of the sum of \$4,000.00 to be paid in ten installments, receipt of the first of which, a cash payment of \$480.00, being thereby acknowledged, the said American Falls Canal & Power Company made, executed and delivered to plaintiff, W. A. West, its certain warranty deed in writing, conveying a certain water right, a copy of which is hereto attached, marked Exhibit "B," and by this reference made a part hereof; and said complainant is now the owner and holder thereof.

## V.

That the lands of said W. A. West, which are now owned by and in the possession of said West, described in said deed, to which the shares of water conveyed in said deed became attached and appurtenant, adjoins the lands described in said deed executed and delivered to said T. E. Fitzgerald, which lands are now owned by and in the possession of said Fitzgerald, and to which the shares of water conveyed in his said deed became attached and appurtenant.

## VI.

That said defendant, after its organization, as aforesaid proceeded to construct and build its said canal and irrigation system for the purpose of supplying and delivering water for the irrigation of lands situate in Bingham and Blaine (a portion of which is now a portion of Power County) Counties, including the lands of plaintiffs herein; but the same is not, nor ever has been, constructed or completed so as to carry and deliver water of said [119]



system for the irrigation of the lands of said plaintiffs or any portion thereof, as required by the deeds aforesaid; that sufficient water is not available under the present works as completed at the present time to furnish the contract holders under said system who are to take their water from lateral No. 33, with sufficient water to properly irrigate their lands.

## VII.

That notwithstanding the said deeds and the obligations assumed by, and devolving upon, said defendant thereunder to carry, furnish and deliver ample water for the proper irrigation of the lands of said plaintiffs, although there was plenty of water available at the place of diversion, and, notwithstanding the fact that each of said plaintiffs had duly and fully performed all the conditions and obligations of said deeds to be by said plaintiffs performed, utterly failed, neglected and refused and still fails, neglects and refuses, to construct and complete its said system, so as to furnish, carry, deliver and make available for each of said plaintiff's use, ample water, or any water, for the proper irrigation of the lands of said plaintiffs, or any portion thereof, or crops and trees planted and growing thereon in accordance with each of said deeds; said defendant has utterly failed, neglected and refused and still fails, neglects and refuses to construct canals and laterals of a carrying capacity sufficient to deliver water at the rate of one-eightieth of one second-foot per acre at its main canal, and one-fiftieth of one second-foot per acre, or any water, in the lateral from which said plaintiffs were to take water for the irrigation of their said

lands, but, on the contrary, said defendant constructed its said canals and laterals and carried and delivered some water, not sufficient however, to properly irrigate any of said lands, to a point within one-half mile of said land of said T. E. Fitzgerald, but said point was at too low an elevation to allow water to be distributed therefrom over said lands of said plaintiffs, or any part thereof, thus making all of the canal system of said defendant under and below the said lands [120] of said plaintiffs so as to make it impossible to secure water therefrom at any point within one-half mile of said lands, for the irrigation thereof; and did utterly fail, neglect and refuse, and still fails, neglects and refuses, to so locate and construct its said irrigation system in such a manner and in such capacity that ample water for the irrigation of said lands of said plaintiffs, and the crops and trees thereon growing, can or could be carried or furnished or delivered or made available for use on said lands of said plaintiffs or any part thereof, during all of said irrigation seasons, or any part thereof, in accordance with its obligations, under said deeds, but, on the contrary, constructed the canals and laterals of said system, and especially the lateral leading to the lands of said plaintiffs from which they were to take water for their said lands, in such a manner that said lateral and all points of the same within one-half mile of any of said lands is below the point where it is necessary for said plaintiff to take the water from said lateral for distribution and use upon the said lands of said plaintiffs and each part of the same, thus making all of said lateral



over a course and grade that is too low to permit of the distribution of water therefrom over and upon said lands or any part thereof. By reason of so constructing its said canals and laterals, said plaintiffs found, and still find, it impossible to take or distribute water therefrom over their said lands, or any part thereof, for irrigation purposes, or any purposes; that said defendant company, with the full knowledge at all times of said conditions, failed and refused, and still fails and refuses, to remedy the defects in the lateral locations and construction and still fails, neglects and refuses to relocate or reconstruct or complete said laterals and said system, or remedy in any way the defective and improperly located and constructed parts of the canal and irrigation system aforesaid; whereby each of said plaintiffs was, and has been, since [121] the execution of their said deeds, and still is deprived of the water supply to which he is entitled for his said land as aforesaid.

### VIII.

That said defendant notified each of said plaintiffs herein prior to the construction of the lateral leading to the lands of said plaintiffs that it would construct and build a lateral to be known as No. 33, from which it would expect each of said plaintiffs and other water-right holders, having lands lying under the same, to take water therefrom for the irrigation of their lands; which said lateral No. 33 is the one constructed as set forth in paragraph VII herein; that said defendant informed and notified each of the plaintiffs herein that it would construct



said lateral of sufficient elevation and to a certain point near the west side-line of the land of said T. E. Fitzgerald and with the understanding between said defendant and the plaintiffs herein that they would then construct a common lateral for a certain distance across the land of said Fitzgerald and then said West could make connections therewith with a lateral leading to his land for the irrigation thereof; that this arrangement was made and agreed upon by reason of the location of the lands of the plaintiffs herein, the same being adjoining and contiguous.

#### IX.

That during the year 1909, said plaintiffs, at great expense, constructed the necessary laterals, ditches, flumes and gates leading from the point aforesaid, at which they were to connect with the said defendant company irrigation system to and over said lands of said plaintiffs for taking and distributing water thereon, and said plaintiffs were ready, willing and fully prepared, and said ditches and flumes of said plaintiffs were properly located, constructed and of sufficient capacity, to receive and distribute the water they were entitled to under said deeds upon their said lands for the irrigation thereof.  
[122]

#### X.

That the boundaries of the lands of each of said plaintiffs and all of the same lie under the canals, laterals, etc., making up said irrigation system of the defendant, and is now, and has been, during all the times mentioned herein, susceptible of irrigation under said system; that said tracts of land are dry and arid in

character and require the artificial use of water thereon before crops of any kind can be successfully raised; that there is no water of any kind available or obtainable on or near said lands, which can be utilized for irrigation, cultivation, reclamation or other purposes on said land, other than through said irrigation system, nor has there been, during any of the times mentioned herein, all of which said defendant company at all times well knew.

### XI.

That said defendant corporation is insolvent in law and in fact and unable to pay its debts or meet its current obligations as they become due, and is without means to complete said system, especially said lateral No. 33, so as to deliver water to each of these plaintiffs in accordance with their said deeds; that there are no assets of said defendant company available for the completion of said system, especially said lateral No. 33, except the amounts remaining unpaid on the deferred payments of deeds executed by said company to purchasers of water rights under said system and that there are a large number of said deferred payments still remaining unpaid, amounting to many thousands of dollars and more than sufficient to complete said system and especially said lateral No. 33, the completion of which will not exceed the sum of \$2,500.00.

### XII.

That said plaintiff, T. E. Fitzgerald, has made three payments on his said deed, amounting to the sum of \$1,638.72, and the said plaintiff, W. A. West, has made the first payment on his said deed, amount-



ing to the sum of \$480.00; that in accordance with the [123] terms of their said contract, the plaintiffs herein, and each of them, still owe to the defendant corporation the balance of the purchase price on the water right and water shares conveyed therein; that otherwise, each of said plaintiffs has at all times since the execution of said deeds, fully performed each and every condition and obligation to be by him performed under his said deed or otherwise due to said company from each of said plaintiffs; that each of said plaintiffs has failed and refused to pay the other deferred payments and interest on his said contract, for the reason that said defendant has failed and refused and neglected to complete said system, especially said lateral No. 33, and because the said defendant still fails and refuses to place said system in a condition to deliver water to each of said plaintiffs for the year 1914, or at all, for the irrigation of its said lands or any part thereof; that each of said plaintiffs is ready and willing to perform the terms and conditions of his said deed, in all things to be kept and performed by him, whenever the defendant corporation is compelled by this Court to perform the terms and conditions of said deeds on its part.

### XIII.

That said plaintiffs are jointly interested in and are joint owners with the other water users of the said irrigation system and they are entitled to have all deferred payments still remaining unpaid and the proceeds of both principal and interest received under and by virtue of all deeds and all moneys due



and owing thereon and upon which any deferred payments or balances are due, applied upon the completion of said irrigation system, and these defendants are especially entitled to have sufficient thereof applied to the completion of said lateral No. 33, and to the performance of all other terms and conditions of said deeds of said plaintiffs to be kept and performed by said defendant corporation. [124]

#### XIV.

That each of said plaintiffs has cultivated and improved large portions of their said lands at great expense and labor and have been unable to secure water under their said deeds for the irrigation thereof; and each of said plaintiffs has, during past irrigation seasons, suffered great damage and loss, amounting to many thousand dollars, by reason of the destruction of their crops and trees planted on their said lands by reason of the failure to receive water under their said deeds and to have said lateral No. 33 completed as aforesaid; that they will be in great need of water for the irrigation season of 1914 for the use on their said lands; that said defendant company does not intend to complete said system and especially said lateral No. 33, so that neither of said plaintiffs can secure water for the irrigation of his said lands under his said deed; that unless a receiver is appointed by this court and authorized to take possession of this system and administer and complete the same, these plaintiffs and each of them, and the other water-right holders under said system who have not received water in accordance with

their water deeds, will suffer great and irreparable injury and loss.

#### XIV.

That the amounts or deferred payments due or to become due on said deeds amounted to several hundred thousand dollars; that said American Falls Canal & Power Company has been, for several years, collecting, or causing to be collected, the deferred payments on the water deeds executed by said defendant to the settlers and water users under said system, applying, or having applied, the proceeds to its own use and benefit; that said defendants threaten to, and unless prevented by order of this Court, will continue to collect or cause to be collected any and all deferred payments or amounts unpaid on said water deeds as the same become due and apply and appropriate said amounts so collected to the use and [125] benefit of said defendant and thereby divert said amounts so collected as aforesaid, so that the same will not be expended in the completion of said canal system, as aforesaid.

#### XV.

That it is for the best interests of the plaintiffs herein and their only remedy that a receiver be appointed for said defendant, American Falls Canal & Power Company, and authorized to collect sufficient moneys due and owing or to become due and owing from the holders of water deeds entered into with said defendant corporation, and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33, so that said plaintiffs and each of them may be sup-

plied with the amount of water to be delivered to him as required by his said deed.

XVI.

That neither of said defendants has a plain, speedy and adequate remedy at law.

WHEREFORE, plaintiffs pray and demand:

I.

That some competent and proper person be appointed receiver by the Court, with power to complete said system and with full power to collect sufficient moneys due and owing or to become due and owing from the holders of water deeds entered into with said defendant corporation and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed.

II.

For costs of suit herein and for such other and further relief as may be just and equitable in the premises.

SULLIVAN & SULLIVAN,

Residence: Boise, Idaho,

BAIRD & DAVIS,

Res.: American Falls, Idaho,

Attorneys for Plaintiffs. [126]

State of Idaho,

County of Ada,—ss.

W. E. Sullivan, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiffs



in the above-entitled cause and makes this verification for and on behalf of said plaintiffs; that he has read the foregoing complaint, knows the contents thereof, and that he believes the facts stated therein to be true; that the reason why this verification is not made by the plaintiffs herein is because said plaintiffs are absent from Ada County, where said attorney resides; and for the further reason that the facts stated in said complaint are within the knowledge of this affiant.

W. E. SULLIVAN.

Subscribed and sworn to before me, this 2d day of April, 1914.

[Seal]

R. GARLAND DRAPER,

Notary Public. [127]

**Exhibit "L" [Petition of Trustee in Bankruptcy for Order to Show Cause, etc.].**

**EXHIBIT "L."**

*In the District Court of the United States for the District of Idaho.*

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

The petition of Glenn R. Bothwell, as trustee in bankruptcy of the American Falls Canal & Power Company, respectfully shows to the Court:

I.

That on the 24th day of February, 1914, the American Falls Canal & Power Company, a corporation organized and existing under and pursuant to the laws of the State of Utah, filed its voluntary petition

in bankruptcy in the District Court of the United States for the District of Utah, wherein it prayed to be adjudged a bankrupt under the laws of the United States. That thereafter on the 27th day of February, 1914, the United States District Court for the District of Utah, made and entered its order in said matter adjudicating the said American Falls Canal & Power Company a bankrupt within the purview of said laws of the United States, and referred the estate of said bankrupt to Charles Baldwin, referee in bankruptcy of said court, for administration. That a copy of said order of adjudication and reference is hereto attached marked Exhibit "A" and made a part of this petition.

## II.

That after the reference of said matter to the said referee, said referee caused notice to creditors to be published pursuant to law and the orders of the Court, and on the 16th day of March, 1914, a meeting of the creditors of said bankrupt was held before the said Charles Baldwin, referee in bankruptcy, at Salt [128] Lake City, Utah, and at said meeting claims were proved and allowed by said referee, and the creditors of said bankrupt by their votes elected Glenn R. Bothwell, your petitioner, trustee in said bankruptcy matter, and upon such election the said referee duly made and entered an order appointing the said Glenn R. Bothwell a trustee in said matter and fixed his bond at the sum of One Hundred Thousand (\$100,000.00) Dollars. That thereafter on said date the said Glenn R. Bothwell executed and delivered said bond and did all things that was necessary

to qualify him as such trustee, and he is now the duly elected, appointed, qualified and acting trustee in the matter of the bankruptcy of the said American Falls Canal & Power Company.

### III.

Your petitioner further represents that said bankrupt estate consists of real and personal property located within the States of Utah and Idaho, and is specifically described and scheduled in said original bankruptcy proceedings.

### IV.

That on the 2d day of April, 1914, one T. E. Fitzgerald and one W. A. West, as parties plaintiffs, acting by and through Spencer L. Baird and Ben W. Davis, engaged in the practice of law under the firm name of Baird & Davis, at American Falls, Idaho, and W. E. Sullivan and L. L. Sullivan, engaged in the practice of law at Boise, Idaho, under the firm name of Sullivan & Sullivan, instituted a suit in the District Court of the Fifth Judicial District in and for Power County, State of Idaho, against the said bankrupt, the American Falls Canal & Power Company, and on said date caused summons to be issued and served upon said bankrupt, and upon the same date applied to the Court for and the Court issued an order requiring said bankrupt to appear before Honorable Alfred Budge, at American Falls, Idaho, on the 11th day of April, 1914, and show cause, if any [129] it has, why an order should not be made and entered by said court appointing a receiver of said defendant company, with power to complete a certain lateral to said American Falls Canal, and to col-



lect sufficient moneys due and owing said bankrupt, or to become due and owing from the holders of water deeds of said bankrupt, and to expend the same in the completion of said canal and said lateral. That a copy of said complaint, summons and order to show cause is hereto attached marked Exhibit "B," and made a part of this petition.

V.

Your petitioner further represents that by said proceeding the said T. E. Fitzgerald and W. A. West are attempting to secure preferences and advantages over other creditors of said corporation and to compel the application and use of the assets of said estate for their own special benefit and advantage, and greatly to the annoyance of your *petition* and to the damage of other creditors, contrary to the provisions of the said bankruptcy law, and that it would be advisable and to the advantage of said estate that some suitable person be appointed ancillary trustee by this Court to act for and in connection with your petitioner in the administration of said estate.

WHEREFORE, your petitioner prays:

1. For an order requiring the said T. E. Fitzgerald and W. A. West, and Spencer L. Baird and Ben W. Davis, and W. E. Sullivan and L. L. Sullivan, as attorneys for the said T. E. Fitzgerald and W. A. West, plaintiffs in said proceedings, to appear before this court at a time certain to be designated by the Court, and show cause, if any they have, why they should not be permanently enjoined from instituting any proceeding in any State court of said State of Idaho against your petitioner or the said American

Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of said bankrupt, [130] and in the meantime and until said order can be heard, your petitioner prays for an order enjoining and restraining the said T. E. Fitzgerald and W. A. West, and each and all of their said attorneys, from appearing before the said Honorable Alfred Budge on the said 11th day of April, 1914, or at any other time or before any other Judge or court in the said State of Idaho, excepting only this court, and applying for or prosecuting said order or any other order to show cause, and from making said application or any other application for the appointment of a receiver of said bankrupt corporation, or from interfering with the possession, use or disposition of any of the assets of said bankrupt corporation.

2. Your petitioner prays that upon final hearing of said order the Court designate and appoint some proper and suitable person as ancillary trustee in the matter of the bankruptcy of said American Falls Canal & Power Company, with full power and authority to act under and in connection with your petitioner in the collection and distribution of the assets of said bankrupt corporation and the administration of said estate, pursuant to law and the orders of the District Court of the United States for the District of Utah and of this court.

3. Your petitioner prays for general relief, including costs herein.

J. D. SKEEN,  
L. R. MARTINEAU and  
I. B. EVANS,

Solicitors for Petitioner,  
Walker Bank Building, Salt Lake City, Utah.

State of Utah,  
County of Salt Lake,—ss.

Glenn R. Bothwell, being first duly sworn, deposes and says: That he is the person named as petitioner in the foregoing petition; that he has read said petition, knows the contents thereof and that the same is true.

GLENN R. BOTHWELL.

Subscribed and sworn to before me this 10th day of April, 1914.

[Seal]

WM. J. COWAN,  
Notary Public. [131]

*In the District Court of the United States for the  
District of Idaho.*

IN BANKRUPTCY.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Order to Show Cause.**

It appearing to the Court from the petition of Glenn R. Bothwell, as trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, that the said American Falls Canal & Power Company was on the 24th day of February,



1914, by the District Court of the United States for the District of Utah, duly adjudicated a bankrupt, and that such proceedings were thereafter had that the said Glenn R. Bothwell became and now is the duly appointed, qualified and acting trustee of said bankrupt. And it further appearing to the Court that said bankrupt estate consists of real and personal property located in Utah and Idaho, and that on the 2d day of April, 1914, one T. E. Fitzgerald and one W. A. West, acting by and through Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, have instituted a proceeding in the District Court for Power County, State of Idaho, and are seeking to secure the appointment of a receiver to take possession of the assets of said bankrupt,—

NOW, THEREFORE, upon motion of J. D. Skeen, one of the solicitors for the petitioner, it is ordered that the said T. E. Fitzgerald and W. A. West and Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, their attorneys, appear before this Court at Boise, Idaho, on the 17th day of April, 1914, and show cause, if any they have, why they should not be enjoined and restrained from further prosecuting said action wherein T. E. Fitzgerald and W. A. West are plaintiffs and the American Falls Canal & Power Company, a corporation, is defendant, and from presenting said order to show cause or otherwise applying to said [132] court or any other court in the State of Idaho for an order appointing a receiver of said American Falls Canal & Power Company, or of any of its property located in the State of Idaho or elsewhere or from directly or indirectly

taking or attempting to take possession of any of the real or personal property or assets of said American Falls Canal & Power Company, or from causing or seeking to cause any other person or corporation to take possession of said property or assets, or otherwise interfering with the administration of the assets of said corporation or the possession, use or disposition of its property.

And it is further ordered that until said matter can be heard on said 17th day of April, 1914, or any other date to which it might be by this court continued, it is ordered that the said T. E. Fitzgerald and W. A. West and Spencer L. Baird, Ben W. Davis, W. E. Sullivan and L. L. Sullivan, their attorneys, be and they are hereby enjoined and restrained from doing or attempting to do any of the things hereinabove specified.

Provided, however, that this order shall not take effect until the said Glenn R. Bothwell, as such petitioner, shall have executed and delivered to the clerk of this court a good and sufficient undertaking in the penal sum of Twenty-five Hundred (\$2500.00) Dollars.

Dated this 13th day of April, 1914.

F. S. DIETRICH,  
Judge. [133]

**[Order Enjoining and Restraining T. E. Fitzgerald  
and W. A. West from Proceeding Further in  
Action, etc.]**

*In the District Court of the United States for the  
District of Idaho, Southern Division.*

**IN BANKRUPTCY.**

**In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.**

The order to show cause why T. E. Fitzgerald and W. A. West should not be enjoined from further prosecuting an action in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, wherein T. E. Fitzgerald and W. A. West are plaintiffs and the American Falls Canal & Power Company is defendant, praying for the appointment of a receiver, coming on regularly for hearing, J. D. Skeen appearing as attorney for Glenn R. Bothwell, Trustee of said bankrupt, and W. E. Sullivan appearing as attorney for said T. E. Fitzgerald and W. A. West; and it appearing to the Court that said bankrupt was possessed of property located within the State of Idaho and that the legal title and possession of said property was in the trustee prior to the institution of said proceeding; and it further appearing that it is the duty of the said trustee in bankruptcy to apply to the referee in bankruptcy for authority to reconstruct and rebuild a certain lateral conveying water from American Falls Canal & Power Co. system to the lands of said



T. E. Fitzgerald and W. A. West—commonly known as Lateral No. 33—so as to properly irrigate said lands;

IT IS ORDERED that said T. E. Fitzgerald and W. A. West be, and they are, hereby enjoined and restrained from proceeding further in said action in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, until further order of this Court; and

IT IS FURTHER ORDERED that the said Glenn R. Bothwell [134] as trustee in the Matter of the Bankruptcy of the American Falls Canal & Power Co., make application at once for authority from the said Bankruptcy Court within the District of Utah, to reconstruct and rebuild said Lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company System to the lands owned by the said T. E. Fitzgerald and W. A. West for the proper irrigation of said lands, pursuant to the contracts attached to complaint in said action and to the petition herein as Exhibit "B," the expense of such reconstruction work to be paid as directed by said Bankruptcy Court; and

IT IS FURTHER ORDERED that the said Glenn R. Bothwell, as such trustee, report to this Court his proceedings in the matter on the 5th day of May, 1914, at the hour of ten o'clock A. M.

Dated this 17th day of April, 1914.

F. S. DIETRICH,  
United States District Judge.

[Endorsed]: Filed May 4, 1914. A. L. Richardson, Clerk. [135]

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*In the United States District Court for the District  
of Idaho, Southern Division.*

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Order [Vacating and Setting Aside Order Dated  
April 17, 1914, etc.].**

The Court having heretofore, to wit, on April 17, 1914, made an order temporarily restraining T. E. Fitzgerald and W. A. West from taking certain proceedings in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, and having directed the applicant for the injunctive order, Glen R. Bothwell, trustee in bankruptcy, to make an application at once for authority from the Bankruptcy Court in Utah to reconstruct and rebuild a certain lateral therein referred to as Lateral No. 33, in such manner as to convey water from the main canal of the American Falls Canal & Power Company's system to the lands owned by T. E. Fitzgerald and W. A. West, and it now appearing to the Court from a report made and filed herein that no such application has been made, but that upon the other hand an application has been made to the Bankruptcy Court of Utah for the rejection of the claim of said Fitzgerald and said West that such lateral be constructed under their contracts, and it further appearing to the Court that there is danger

that unless such lateral is constructed without delay said Fitzgerald and said West will not be able to irrigate their lands during the irrigating season for 1914;

It is therefore ordered that said former order, dated April 17, 1914, be, and the same is hereby vacated and set [136] aside and the injunctive relief prayed for by the trustee in bankruptcy is denied.

It is agreed that this matter has come on for hearing upon this 4th day of May, instead of the 5th day of May, as provided in said former order, by agreement and for the convenience of counsel in the case.

The petitioner, the trustee, is given an exception.

Dated this 4th day of May, 1914.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed May 4, 1914. A. L. Richardson, Clerk. [137]

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**[Petition for Appeal from Interlocutory Order or Decree of May 4, 1914, and Order Allowing Appeal, etc.]**

*In the District Court of the United States for the District of Idaho, Southern Division.*

IN BANKRUPTCY.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.



PETITION ON APPEAL BY GLENN R. BOTHWELL, TRUSTEE IN BANKRUPTCY OF THE AMERICAN FALLS CANAL & POWER COMPANY, BANKRUPT.

The above-named Glenn R. Bothwell, Trustee in bankruptcy, considering himself aggrieved by the interlocutory order or decree made and entered on the 4th day of May, A. D. 1914, in the above-entitled cause, to the extent that said order or decree vacated the interlocutory order or decree made and entered on the 17th day of April, A. D. 1914, in the above-entitled cause, granting said Trustee injunctive relief enjoining T. E. Fitzgerald and W. A. West from proceeding further in an action, therein referred to, pending in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West, are plaintiffs and said American Falls Canal & Power Company is defendant, and also in denying said Trustee in bankruptcy the injunctive relief against said T. E. Fitzgerald and W. A. West prayed for by him in the above-entitled cause; does hereby appeal from such interlocutory order or decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, filed herein, and prays that this, his [138] appeal, may be allowed and that a transcript of the record, proceedings and papers upon which said order or decree was made, duly authenticated, may be sent to the United States Cir-

cuit Court of Appeals in and for the Ninth Circuit.

L. R. MARTINEAU, Jr.,

ISAAC BLAIR EVANS,

Attorneys for Glenn R. Bothwell, Trustee in Bankruptcy.

A. L. HOPPAUGH,

CHARLES C. DEY,

Of Counsel.

And now, to wit, on the 15th day of May, A. D. 1914, it is ordered that the appeal be allowed as prayed for. Bond on appeal fixed at \$200.00.

FRANK S. DIETRICH,

District Judge for the District of Idaho.

[Endorsed]: Filed May 15, 1914. A. L. Richardson, Clerk. [139]

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*In the District Court of the United States for the  
District of Idaho, Southern Division.*

IN BANKRUPTCY—No. —.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Assignment of Errors.**

Comes now Glenn R. Bothwell, Trustee in bankruptcy of said American Falls Canal & Power Company, bankrupt, and files the following assignment of errors upon which he will rely upon his appeal from the order or decree made by this Honorable Court on the 4th day of May, A. D. 1914, in the above-entitled matter, and said Trustee in bankruptcy says

that said order or decree in said cause is erroneous and against the just rights of said trustee for the following reasons:

### I.

The Court erred in vacating and setting aside, by its order or decree of May 4th, 1914, the injunction granted by its former order or decree herein dated April 17th, 1914, enjoining and restraining T. E. Fitzgerald and W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, [140] wherein the said T. E. Fitzgerald and W. A. West are plaintiffs and said American Falls Canal & Power Company is defendant.

### II.

The Court erred in denying, by its order or decree of May 4th, 1914, the injunctive relief prayed for by Glenn R. Bothwell, Trustee in bankruptcy of said American Falls Canal & Power Company, by his petition filed herein on the 11th day of April, A. D. 1914, restraining and enjoining T. E. Fitzgerald and W. A. West from proceeding in any State court of the State of Idaho against said Trustee in bankruptcy or said American Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of said bankrupt.

### III.

The Court erred in its finding or recital contained in its order or decree herein, made and filed May 4th, 1914, wherein it is recited:



“And it further appearing to the Court that there is danger that unless such lateral is constructed without delay, said Fitzgerald and said West will not be able to irrigate their lands during the irrigating season for 1914.”

In that, there was no evidence whatsoever to support said finding or recital. On the contrary, as it appears by the record herein, there was no legal basis or foundation to support said finding or recital; and further that the entire subject matter involved in said finding has been submitted to and was then before the District Court of the United States in and for the District of Utah, as the primary court of bankruptcy, and was there pending and has not been passed upon nor determined.

WHEREFORE, your petitioner, the Trustee in bankruptcy, prays that the Court would allow an appeal herein from said order [141] or decree of May 4th, 1914; and would fix the amount and approve a bond to operate as a *supersedeas* of said order appealed from and a continuation of the injunction order of April 17th, 1914.

L. R. MARTINEAU, Jr.,

ISAAC BLAIR EVANS,

Attorneys for Glenn R. Bothwell, Trustee in Bankruptcy.

A. L. HOPPAUGH,

CHARLES C. DEY,

Of Counsel. [142]

**[Order Allowing Appeal, Fixing Amount of Bond  
on Appeal, and Denying Prayer for a Superse-  
deas.]**

*In the United States District Court for the District  
of Idaho.*

In the Matter of AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**ORDER ALLOWING APPEAL AND DENYING  
A SUPERSEDEAS.**

Glenn R. Bothwell, Trustee in bankruptcy of the American Falls Canal and Power Company, having this day presented his petition praying for an order allowing an appeal from an order made and entered May 5th, 1914, and also praying for a *supersedeas*:

It is ordered that the appeal be allowed and the bond on appeal is fixed at \$200.00; the prayer for a *supersedeas* is denied.

The denial of the *supersedeas* is put upon the ground specially that the original injunction or restraining order which was vacated by the order appealed from was not signed after a consideration of the merits of the application therefor, but upon the assent of counsel for West and Fitzgerald, upon the condition and with the understanding on the part of the Court, that the trustee would, without delay, seek authority from the Utah court to construct the laterals referred to in the record, as he is directed to do in the order. The trustee having now failed to comply with such direction, and having pursued a

contrary course, it is thought that it would be improper to continue in force the original order.

May 15, 1914.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed May 15, 1914. A. L. Richardson, Clerk. [143]

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THE AETNA ACCIDENT AND LIABILITY  
COMPANY, HARTFORD, CONNECTICUT.

MORGAN G. BULKELEY, PRESIDENT.

*In the District Court of the United States for the  
District of Idaho, Southern Division.*

IN BANKRUPTCY—No. —.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Glenn R. Bothwell, Trustee in bankruptcy of said bankrupt, as principal, and the Aetna Accident and Liability Company, a corporation of the State of Connecticut and licensed to become sole surety upon bonds in the State of Idaho, as surety, are held and firmly bound unto T. E. Fitzgerald and W. A. West in the full and just sum of Two Hundred (\$200.00), to be paid to the said T. E. Fitzgerald and W. A. West, his and their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our



successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately at the District Court of the United States for the District of Idaho, Southern Division, in a suit depending in said court in said above-entitled bankruptcy matter between Glenn R. Bothwell, Trustee in bankruptcy of said bankrupt, petitioner, and T. E. Fitzgerald and W. A. West, respondents, an order or decree was rendered against the said petitioner, Glenn R. Bothwell, Trustee in bankruptcy, dissolving or vacating an injunction previously granted by said court in said matter and cause, also denying the said petitioner any injunctive relief; and

WHEREAS, the said petitioner has obtained an appeal of the said court to reverse the said order or decree in the aforesaid matter and suit upon the execution of a bond in the penalty of \$200.00, with good and sufficient surety to be approved by said District Court conditioned according to law, and has also obtained a citation directed to the said T. E. Fitzgerald and W. A. West citing and admonishing him and them to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after the date of said citation:

NOW, THEREFORE, if the above-named petitioner and appellant, Glenn R. Bothwell, Trustee in bankruptcy, shall prosecute his appeal to effect, and

answer all costs, if he fails to make his plea good, then this obligation to be void; otherwise to remain in full force and effect. [144]

GLENN R. BOTHWELL,  
Trustee in Bankruptcy.  
THE AETNA ACCIDENT AND LIABILITY COMPANY.

By B. F. GROWEG,  
Resident Vice-President.

[Seal]

Attest: JNO. T. BRUNN,  
Resident Assistant Secretary.

FRED VEALD,  
Resident Agent.

Approved by

FRANK S. DIETRICH,  
Judge of the District Court of the United States for  
the District of Idaho.

[Endorsed]: Dated May 25th, 1914. A. L. Richardson, Clerk. [145]

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IN BANKRUPTCY—No. —.

In the Matter of the AMERICAN FALLS CANAL  
& POWER COMPANY, a Corporation,  
Bankrupt.

**Praeipie for Transcript on Appeal.**

To the Clerk of Said Court:

You are hereby requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the entire record

of all proceedings in said court in the above-entitled matter.

Dated this 14th day of May, A. D. 1914.

L. R. MARTINEAU, Jr.,

ISAAC BLAIR EVANS,

Attorneys for Glenn R. Bothwell, Trustee in Bankruptcy.

A. L. HOPPAUGH,

CHARLES C. DEY,

Of Counsel.

[Endorsed]: Filed May 15, 1914. A. L. Richardson, Clerk. [146]

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**Citation [on Appeal (Original)].**

*The United States Circuit Court of Appeals for the Ninth Circuit.*

United States of America,—ss.

To T. E. Fitzgerald and W. A. West, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the District Court of the United States for the District of Idaho, Southern Division, in the matter of the American Falls Canal & Power Company, a corporation, bankrupt, wherein Glenn R. Bothwell, Trustee in bankruptcy of said bankrupt, is appellant and you are appellees, to show cause, if any there be, why the order or decree rendered in said cause vacating and setting aside



the injunction order dated April 17th, 1914, and denying the injunctive relief prayed for by the Trustee in bankruptcy as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, Judge of the United States District Court for the District of Idaho, this 15th day of May, A. D. 1914.

FRANK S. DIETRICH,  
Judge of the United States District Court, for the  
District of Idaho.

[Seal]                      Attest: A. L. RICHARDSON,  
Clerk. [147]

Service of the within Citation by copy admitted  
this 18th day of May, 1914.

SULLIVAN & SULLIVAN,  
Attorneys for Respondent.

[Endorsed]: No. 679. U. S. District Court, District of Idaho. In the Matter of the American Falls Canal & Power Company, a Corporation, Bankrupt. Citation. Filed May 18th, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy Clerk. [148]

**Return to Record.**

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Cir-

cuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk.

By E. B. Yarrington,

Deputy. [149]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States for the  
District of Idaho, Southern Division.*

In the Matter of AMERICAN FALLS CANAL &  
POWER COMPANY, a Corporation,  
Bankrupt.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 150, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$84.70, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court affixed at Boise, Idaho, this 28th day of May, 1914.

[Seal]

A. L. RICHARDSON,

Clerk.

By E. B. Yarrington,

Deputy Clerk. [150]

**[Petition for Revision Under Section 24 of  
Bankruptcy Law of 1890, etc.]**

*In the District Court of the United States for the  
District of Idaho.*

IN BANKRUPTCY—No. —.

In the Matter of AMERICAN FALLS CANAL &  
POWER COMPANY, a Corporation,  
In Bankruptcy.

To the Honorable, the Judges of the Circuit Court of  
Appeals of the 9th Circuit of the United States.

The petition of Glenn R. Bothwell, as Trustee in  
bankruptcy in the American Falls Canal & Power  
Company, a corporation, respectfully shows to the  
Court:

I.

That on the 24th day of February, A. D. 1914, the  
American Falls Canal & Power Company, a corpora-  
tion organized under and pursuant to the laws of the  
State of Utah, filed its voluntary petition in bank-  
ruptcy in the District Court of the United States for  
the District of Utah, wherein it prayed to be adjudi-  
cated a bankrupt under the laws of the United  
States; that thereafter on the 27th day of February,  
A. D. 1914, the District Court of the United States  
for the District of Utah, made and entered its order  
in said matter, adjudicating said American Falls  
Canal & Power Company a bankrupt, within the pur-  
view of said laws of the United States and referred  
the estate of said bankrupt to the Honorable Charles



Baldwin, Referee in bankruptcy of said court, for administration.

## II.

That after the reference of said matter to said referee, said referee caused notice to be published pursuant to law and to the orders of Court, and on the 16th day of March, A. D. 1914, a meeting of the creditors of said bankrupt was held before Honorable Charles Baldwin, Referee in bankruptcy, at Salt Lake City, State of Utah, and at said meeting, claims were proved and [152] allowed by said referee and the creditors of said bankrupt, by their votes, elected Glenn R. Bothwell, your petitioner, Trustee in said bankruptcy matter, and upon such election, said referee duly made and entered an order appointing the said Glenn R. Bothwell, your petitioner, such Trustee and fixed his bond at the sum of \$100,000.00. That thereafter, on said date, the said Glenn R. Bothwell executed and delivered said bond and did all things that were necessary to qualify him as such Trustee, and he, your petitioner, is now the duly elected, appointed, qualified and acting Trustee in the matter of the bankruptcy of the said American Falls Canal & Power Company.

## III.

Your petitioner further represents that the said bankrupt's estate consists of real and personal property, located within the States of Utah and Idaho, and is specifically described and scheduled in said original bankruptcy proceedings.

## IV.

That after such adjudications, the following pro-

ceedings were had in the case of said bankrupt, as will be shown more fully by the transcript of the record on Appeal in the above-entitled matter and certified to by the Clerk of Court, which transcript is hereby referred to and made a part of this petition. That on and prior to the 6th day of April, A. D. 1914, one W. A. West and one T. E. Fitzgerald, creditors of said bankrupt estate, had notice and full knowledge of the proceedings of the bankrupt herein, the adjudication of the said American Falls Canal & Power Company as such bankrupt, and the appointment of said Trustee in bankruptcy; nevertheless the said parties instituted a suit in the District Court of the 5th Judicial District in and for Power County, State of Idaho, against the said American Falls Canal & Power Company (Transcript, page 118). That in and by said action, the said parties ignored the proceedings in bankruptcy above referred to and the appointment [153] of said Trustee in bankruptcy, and shown by their complaint to procure an appointment of a receiver of the assets and effects of said bankrupt; and to enforce in such receivership proceedings, the repairs and completion of a certain lateral No. 33 of that certain canal and irrigation system originally constructed by said American Falls Canal & Power Company; that on the 6th day of April, A. D. 1914, the said W. A. West and T. E. Fitzgerald caused summons to be issued and served on said American Falls Canal & Power Company, and upon the same date applied to the Court for, and the Court issued an order requiring the said American Falls Canal & Power Company to appear before



Honorable Alfred Budge, Judge, at American Falls, State of Idaho, on the 11th day of April, A. D. 1914, and show cause, if any it had, why an order should not be made and entered by said Court, appointing a receiver for the purpose hereinbefore set out. (Transcript, page 9.)

V.

That upon receiving a notice of the action mentioned in the next preceding paragraph, your petitioner, as Trustee in bankruptcy, did file in the District Court of the United States for the District of Idaho, a petition (Transcript, page 1), setting forth that said action had been instituted and praying that the parties involved therein should be required to show cause before the Honorable Frank S. Dietrich, Judge, of the District Court of the United States for the District of Idaho, why they should not be permanently enjoined from instituting a proceeding in any court of said State of Idaho against said bankrupt, and from directly or indirectly interfering with the disposition of the assets of said bankrupt, and in the meantime, praying for a temporary restraining order and for other and further relief, as is set forth by said petition. [154]

VI.

That on the said 11th day of April, A. D. 1914, your petitioner, by his attorneys, filed a petition in the said District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, setting forth in detail the petition in bankruptcy herein, the adjudication by this Court and the appointment of your petitioner as Trustee, and sug-



gesting the ancillary proceedings hereinbefore referred to, pending before the District Court of the United States for the District of Idaho, and requested the said Court, Honorable Alfred Budge presiding, to stay the proceedings in said action; that notwithstanding said petition and the said application for the stay of said proceeding, the said State Court, on or about the 13th day of April, A. D. 1914, made and entered an order for the appointment of a receiver, with power to do the things prayed for in said complaint; that before a receiver qualified or said order had become effective, on the said 13th day of April A. D. 1914, the United States District Court for the District of Idaho issued an order (Transcript, page 132), requiring the said T. E. Fitzgerald and W. A. West, and their attorneys, to appear before that Court on the 17th day of April, A. D. 1914, and show cause why they should not be enjoined from further proceeding in said suit in the State Court, and in the meantime, and before said order could be heard, enjoining the said T. E. Fitzgerald and W. A. West and their attorneys from further prosecuting said proceedings in the State Court.

#### VII.

That on the 17th day of April, A. D. 1914, said order to show cause came on regularly for hearing, and after the introduction of evidence, showing the adjudication of said American Falls Canal & Power Company to be a bankrupt, the reference of said matter to the Honorable Charles Baldwin, as Referee in bankruptcy, and the appointment of your petitioner as Trustee [155] and his qualification

as such, the said United States District Court for the District of Idaho made and entered the order which is set forth on pages 134 and 135 of the Transcript herein referred to enjoining and restraining said T. E. Fitzgerald and W. A. West from proceeding further in said action in the District Court of the 5th Judicial District of the State of Idaho, in and for Power County, State of Idaho, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs and the said American Falls Canal & Power Company is defendant, and further ordering Glenn R. Bothwell, as Trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, to make application for authority from the said bankruptcy court within the District of Utah, to reconstruct and rebuild said lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company system to the lands owned by the said T. E. Fitzgerald and W. A. West in the proper irrigation of the said lands, pursuant to the contracts attached to the complaint for said action, the expense of such reconstruction work to be paid as directed by said bankruptcy court, and further ordering the said Glenn R. Bothwell as such Trustee, to report to the said court his proceedings in the matter on the 5th day of May, A. D. 1914.

#### VIII.

Your petitioner further shows that pursuant to the order set forth in the next preceding paragraph, the said Glenn R. Bothwell, as such Trustee, and by way of compliance with said order, presented to the District Court of the United States, in and for the



District of Utah, the petition set forth in the Transcript herein referred to on pages 54 to 135, wherein the entire matter was set out in full, and whereby your petitioner prayed the said District Court of the United States in and for the District of Utah, as the bankruptcy court of original jurisdiction for a decree in relation thereto, as appears more fully by said petition.

IX.

Your petitioner further shows that in order to comply [156] with the said order of the District Court of the United States for the District of Idaho, dated the 17th day of April, A. D. 1914, the said Glenn R. Bothwell presented to said Court a report as requested in said order, which report is set forth in the Transcript herein referred to on pages 51 and 52 together with a copy of the petition as set forth in said Transcript on pages 53 to 135.

X.

Your petitioner further shows that upon the presentation of the said report mentioned in the next preceding paragraph, the District Court of the United States in and for the District of Idaho, entered an order dated the 4th day of May, A. D. 1914, and set forth in the Transcript herein referred to on pages 136 and 137, whereby the injunctive relief granted by said Court on the 17th day of April, A. D. 1914, was set aside and all other injunctive relief was denied.

XI.

Your petitioner further represents that the pro-



ceedings of the said Court were erroneous in matter of law in that:

1. The Court erred in vacating and setting aside, by its order or decree of May 4th, 1914, the injunction granted by its former order or decree herein dated April 17th, A. D. 1914, enjoining and restraining T. E. Fitzgerald and W. A. West from proceeding further in the action pending in the District Court of the 5th Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, and the said American Falls Canal & Power Company is defendant.

2. The Court erred in denying by its order or decree of May 4th, A. D. 1914, the injunctive relief prayed for by Glenn R. Bothwell, Trustee in bankruptcy of the said American Falls Canal & Power Company by his petition filed herein on the 11th day of April, A. D. 1914, restraining and enjoining T. E. Fitzgerald and W. A. West from proceeding in any State court of the State of Idaho against said Trustee in bankruptcy or said American [157] Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of the said bankrupt.

3. The Court erred in not granting an unconditional order, permanently enjoining and restraining the said T. E. Fitzgerald and the said W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, and from in any way interfering with the possession or disposi-

tion of the assets of the said bankrupt.

4. The Court erred by including in its said order dated the 17th day of April, A. D. 1914, the further words following, to wit:

“It is further ordered that the said Glenn R. Bothwell, as Trustee in the matter of the Bankruptcy of the American Falls Canal & Power Company, make application at once for authority from the said Bankruptcy Court within the District of Utah to reconstruct and rebuild said lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company’s system to the lands owned by the said T. E. Fitzgerald and W. A. West for the proper irrigation of said land, pursuant to the contracts attached to complaint in said action and to the petition herein, as Exhibit ‘B,’ the expense of such reconstruction work to be paid as directed by said Bankruptcy Court; and

“It is further ordered that the said Glenn R. Bothwell, as such Trustee, report to this Court his proceedings in the matter on the 5th day of May, A. D. 1914, at the hour of ten o’clock, A. M.”

WHEREFORE, your petitioner, feeling aggrieved because of such orders, asks that the same be revised in matters of law by your Honorable Court as provided in Section 24-b of Bankruptcy Law of 1898, and the rules and practice in such cases provided, and that a stay of execution of the order of May 4, A. D. 1914, hereinbefore recited be ordered by this

Honorable Court, and that the injunction granted by the order of April 17, A. D. 1914, hereinbefore recited, be continued pending the hearing upon this petition.

Dated this 15th day of May, A. D. 1914.

GLENN R. BOTHWELL,  
Trustee in Bankruptcy of the American Falls Canal  
& Power Company.

By L. R. MARTINEAU, Jr.,  
Of Counsel.

Counsel:

CHARLES C. DEY.

A. L. HOPPAUGH.

J. D. SKEEN.

L. R. MARTINEAU, Jr.

ISAAC BLAIR EVANS. [158]

The State of Utah,  
County of Salt Lake,  
City of Salt Lake,—ss.

I, L. R. Martineau, Jr., being first duly sworn, do hereby make a solemn oath that I am one of counsel for Glenn R. Bothwell, Trustee in bankruptcy of the American Falls Canal & Power Company, petitioner in the foregoing petition, and make this verification for and on his behalf, and I do so for the reason that said petitioner is absent from the county and State, and cannot be reached in time to perfect this appeal, and further for the reason that the facts in said petition set forth are within my personal knowledge. The statements of fact contained in said



petition are true, according to the best of my knowledge, information and belief.

L. R. MARTINEAU, Jr.

Subscribed and sworn to before me, this 2d day of June, A. D. 1914.

My commission expires September 25th, 1915.

[Seal]

WM. J. COWAN,  
Notary Public.

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[Endorsed]: No. 2431. United States Circuit Court of Appeals for the Ninth Circuit. Glenn R. Bothwell, as Trustee in Bankruptcy of American Falls Canal & Power Company, Bankrupt, Appellant and Petitioner, vs. T. E. Fitzgerald and W. A. West, Appellees and Respondents. In the Matter of American Falls Canal & Power Company, a Corporation, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, and upon Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898.

Received and filed June 3, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



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United States  
Circuit Court of Appeals

For the Ninth Circuit

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GLENN R. BOTHWELL, as Trustee in Bankruptcy of  
AMERICAN FALLS CANAL & POWER COM-  
PANY, Bankrupt,  
Appellant and Petitioner,

vs.

T. E. FITZGERALD and W. A. WEST,  
Appellees and Respondents.

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In the Matter of AMERICAN FALLS CANAL &  
POWER COMPANY, a Corporation, Bankrupt.

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Brief of Appellant

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Upon Appeal from the United States District Court  
for the District of Idaho and upon Petition  
for Revision Under Section 24b of  
the Bankruptcy Act of  
July 1, 1898.

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CHARLES C. DEY,  
A. L. HOPPAUGH,  
L. R. MARTINEAU, JR. and  
ISAAC BLAIR EVANS,  
Counsel for Appellant.





No. 2431

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**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit**

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GLENN R. BOTHWELL, as Trustee in Bankruptcy of  
AMERICAN FALLS CANAL & POWER COM-  
PANY, Bankrupt,  
Appellant and Petitioner,

*vs.*

T. E. FITZGERALD and W. A. WEST,  
Appellees and Respondents.

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In the Matter of AMERICAN FALLS CANAL &  
POWER COMPANY, a Corporation, Bankrupt.

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**Brief of Appellant**

---

Upon Appeal from the United States District Court  
for the District of Idaho and upon Petition  
for Revision Under Section 24b of  
the Bankruptcy Act of  
July 1, 1898.

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CHARLES C. DEY,  
A. L. HOPPAUGH,  
L. R. MARTINEAU, JR., and  
ISAAC BLAIR EVANS,  
Counsel for Appellant.

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## STATEMENT OF THE CASE.

The facts substantially without dispute bearing upon the controversy here before the court may be briefly stated as follows:

### I.

On the 24th day of February, A. D. 1914, the American Falls Canal & Power Company, a corporation organized under and pursuant to the laws of the State of Utah, filed its voluntary petition in bankruptcy in the District Court of the United States for the District of Utah, wherein it prayed to be adjudicated a bankrupt under the laws of the United States; thereafter on the 27th day of February, A. D. 1914, the District Court of the United States for the District of Utah, made and entered its order in said matter, adjudicating said American Falls Canal & Power Company a bankrupt, within the purview of the said laws of the United States, and referred the estate of said bankrupt to Charles Baldwin, Esquire, referee in bankruptcy of said Court, for administration. (Rec. 6-8.)

### II.

After the reference of said matter to said referee, said referee caused notice to be published pursuant to law and the orders of Court, and on the 16th day of March, A. D. 1914, a meeting of the creditors of said bankrupt was held before said referee in bankruptcy, at Salt Lake City, State of Utah, and at said meeting claims were



proved and allowed by said referee; and the creditors of said bankrupt, by their votes, elected Glenn R. Bothwell, appellant, trustee in said bankruptcy matter, and upon said election said referee duly made and entered an order appointing the said Glenn R. Bothwell such trustee, and fixed his bond at the sum of \$100,000.00; and thereafter, on said date, the said Glenn R. Bothwell executed and delivered said bond and did all things that were necessary to qualify him as such trustee, and he is now the duly elected, appointed, qualified and acting trustee in the matter of the bankruptcy of said American Falls Canal & Power Company. (Rec. 1-2.)

### III.

The bankrupt's estate consists of real and personal property located within the States of Utah and Idaho; said bankrupt was in possession of said real and personal property at the time of said adjudication in bankruptcy, and on his appointment said Glenn R. Bothwell, trustee in bankruptcy, immediately went into the actual possession of said property. The character of the bankrupt's estate will be found fully set forth (Rec. 60-65.). It appears that the United States contracted with the State of Idaho under the provisions of the Act of Congress commonly known as the "Carey Act" (Rec. 60-61) concerning lands in the State of Idaho, and thereafter on the 23rd day of February, A. D. 1901, the State of Idaho contracted with said American Falls Canal & Power Company for the construction of a canal system for the irrigation of a particular portion of such lands. (Rec. 62.)

The lateral, No. 33, hereinafter referred to, is a part of said system.

#### IV.

Prior to the institution of said bankruptcy proceedings, W. A. West and Mary A. Fitzgerald (wife and assignee of T. E. Fitzgerald) had severally commenced actions at law against said American Falls Canal & Power Company in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, seeking to recover damages by reason of the alleged breach of a contract contained in a "water deed" between said American Falls Canal & Power Company and said W. A. West and T. E. Fitzgerald severally, whereby (Rec. 81-86, 87-94) the company by its deeds, similar in form and substance, dated December 8th, A. D. 1906, had warranted and conveyed to said West and Fitzgerald respectively one hundred sixty shares of perpetual water right out of the water appropriated by it from Snake river in Idaho to be used during the irrigation season between April 1st and November 1st of each year and for each and every year thereafter, together with a proportionate interest in the irrigation works, based upon the number of shares of water rights finally sold in said system, each share of water to represent a carrying capacity sufficient to deliver water at the rate of one eightieth of one second foot per acre in main canals and one fiftieth of one second foot per acre in all laterals, limiting, however, the maximum amount of water to be furnished to purchasers during any one irrigation

season to two and a half acre feet. Also therein and thereby the company agrees to carry the water to which the purchaser is entitled, under said conveyance, through its canal system, and to measure and deliver the same at a point within one-half mile from each legal sub-division of one hundred sixty acres. (Rec. 107-116; 118-132.)

Said Mary A. Fitzgerald obtained judgment, in said action at law against said company, on the 13th day of September, A. D. 1913, for \$2,715.00. (Rec. 70.) After the adjudication in bankruptcy and without the trustee being substituted as party defendant, said W. A. West also obtained a judgment, in said action at law against said bankrupt company, for the sum of \$2,715.00. (Rec. 71.)

## V.

After the entry of said judgments, and after said American Falls Canal & Power Company had been adjudged bankrupt, and with full notice and knowledge of the adjudication of said company as a bankrupt and the appointment of the trustee in bankruptcy, said W. A. West and T. E. Fitzgerald did, on the 6th day of April, A. D. 1914, join as plaintiffs in commencing an action against said American Falls Canal & Power Company in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County. The complaint therein is set forth in full (Rec. 13-23), and the prayer of the complaint in substance is for the appointment of a receiver by said State District Court "with power to collect sufficient moneys due and owing, or to become due



and owing from the holders of water deeds entered into with the defendant corporation and to expend the same so collected as shall be necessary to complete said irrigation system and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed." The deeds referred to are the same deeds upon which said actions at law respectively were based.

Upon the institution of said suit, on the 6th day of April, A. D. 1914, said State District Court issued an order in said action requiring said American Falls Canal & Power Company to appear before said Court on the 11th day of April, A. D. 1914, and show cause, if any it had, why an order should not be made and entered by said Court, appointing a receiver for the purpose prayed for in said complaint. (Rec. 9-10.)

## VI.

Upon receiving notice of the action mentioned in the next preceding paragraph, appellant, as trustee in bankruptcy, did file, on the 11th day of April, A. D. 1914, in the District Court of the United States for the District of Idaho, a petition (Rec. 1), setting forth that said action in said State Court had been instituted, and praying that the parties involved therein should be required to show cause before the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, why they should not be permanently enjoined from instituting a proceeding in any Court of said State of Idaho against said bankrupt, and from di-

rectly or indirectly interfering with the assets of said bankrupt, and in the meantime praying for a temporary restraining order and for other and further relief.

## VII.

Also, on the 11th day of April, A. D. 1914, appellant, by his attorneys, filed a petition in the said District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, setting forth in detail the petition in bankruptcy, the adjudication by the District Court of the United States for the District of Utah, and the appointment of appellant as trustee, and suggesting the ancillary proceedings hereinbefore referred to (Paragraph VI), pending before the District Court of the United States for the District of Idaho; and requested said State District Court, Honorable Alfred Budge presiding, to stay the proceedings in said action. (Rec. 72-73.) The said State District Court did, nevertheless, on or about the 13th day of April, A. D. 1914, make and enter an order for the appointment of a receiver, with power to do things prayed for in said complaint. (Rec. 73.) Before the receiver so appointed, qualified, or said order had become effective, and on the said 13th day of April, A. D. 1914, the District Court of the United States for the District of Idaho, issued an order (Rec. 151) requiring the said W. A. West and said T. E. Fitzgerald, and their attorneys, to appear before that said Court on the 17th day of April, A. D. 1914, and show cause why they should not be enjoined from further proceeding in said suit in the State District Court, and, in the meantime, before said order could be heard, enjoining said W. A.

West and said T. E. Fitzgerald and their attorneys from further prosecuting the said proceedings in said State District Court.

### VIII.

On the 17th day of April, A. D. 1914, said order to show cause came on regularly for hearing before said District Court of the United States for the District of Idaho, and after the introduction of evidence, showing the adjudication of said American Falls Canal & Power Company to be a bankrupt, the reference of said matter to Charles Baldwin, Esquire, as referee in bankruptcy, and the appointment of appellant as trustee, his qualification, and his assumption of possession of the property of said bankrupt in the State of Idaho, the said District Court of the United States for the District of Idaho made and entered the order (Rec. 154-155) enjoining and restraining said W. A. West and said T. E. Fitzgerald from proceeding further in said action in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs and the said American Falls Canal & Power Company is defendant, and further ordering said Glenn R. Bothwell, as trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, to make application for authority from the said bankruptcy Court within the district of Utah, to reconstruct and rebuild said lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company's system to the lands owned by said T. E. Fitzgerald and W. A.



West, for the proper irrigation of said land, pursuant to the contracts attached to the complaint in said action in the State Court of Idaho, the expense of said reconstruction to be paid as directed by said bankruptcy Court, and further ordering the said Glenn R. Bothwell, as trustee, to report back on the 5th day of May, A. D. 1914, to the District Court of the United States for the District of Idaho his proceedings in the matter. (Rec. 155.)

### IX.

Pursuant to the order set forth in the next preceding paragraph, said Glenn R. Bothwell, as such trustee, and by way of compliance with said order, presented to the District Court of the United States in and for the District of Utah his petition and exhibits, including all proceedings in the District Court of the United States for the District of Idaho (Rec. 59-156), wherein the entire matter was set out in full and whereby appellant prayed the said District Court of the United States in and for the District of Utah, as the bankruptcy Court of primary jurisdiction, among other things:

“That if the Court should determine it proper and within the power of your petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner to reconstruct said lateral No. 33, as suggested in the order made by said United States District Court for the District of Idaho, and for that purpose that the Court determine the nature and extent and the amount of money to be expended for such construction work, and that the Court determine at whose expense and in what manner such work should be done.” (Rec. 79.)

## X.

In order to comply with the further provision of said order of the District Court of the United States for the District of Idaho, dated the 17th day of April, A. D. 1914, the said Glenn R. Bothwell, trustee in bankruptcy, presented to said District Court of the United States for the District of Idaho, a report as provided in said order (Rec. 57-58), which report embodied a copy of the petition to the District Court of the United States for the District of Utah aforementioned.

## XI.

Upon the presentation of the said report mentioned in the next preceding paragraph, the District Court of the United States for the District of Idaho, entered an order dated the 4th day of May, A. D. 1914, (Rec. 156-157), whereby the injunctive relief granted by the said Court on the 17th day of April, A. D. 1914, was set aside and all other injunctive relief was denied; thereupon Glenn R. Bothwell, trustee in bankruptcy, feeling aggrieved by said order denying injunctive or any relief, has brought said matter both by Appeal and Petition for Review to this Honorable Court.

## **SPECIFICATION OF ERRORS.**

This matter has been brought before this Court both by Petition for Appeal and by Petition for Revision; the assignments of error on the Petition for Appeal being as follows:

1. The Court erred in vacating and setting aside, by its order or decree of May 4th, 1914, the injunction granted by its former order or decree herein dated April 17th, 1914, enjoining and restraining T. E. Fitzgerald and W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs and said American Falls Canal & Power Company is defendant.

2. The Court erred in denying, by its order or decree of May 4th, 1914, the injunctive relief prayed for by Glenn R. Bothwell, trustee in bankruptcy of said American Falls Canal & Power Company, by his petition filed herein on the 11th day of April, A. D. 1914, restraining and enjoining T. E. Fitzgerald and W. A. West from proceeding in any State Court of the State of Idaho against said trustee in bankruptcy or said American Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of said bankrupt.

3. The Court erred in its finding or recital contained



in its order or decree herein, made and filed May 4th, 1914, wherein it is recited:

“And it further appearing to the Court that there is danger that unless said lateral is constructed without delay, said Fitzgerald and said West will not be able to irrigate their lands during the irrigating season for 1914.”

In that, there was no evidence whatsoever to support said finding or recital. On the contrary, as it appears by the record herein, there was no legal basis or foundation to support said finding or recital; and further that the entire subject matter involved in said finding has been submitted to and was then before the District Court of the United States in and for the District of Utah, as the primary court of bankruptcy, and was there pending and had not been passed upon or determined.

The enumeration of errors under the Petition for Revision under Section 24 of the Bankruptcy Act of 1898, is as follows:

1. The Court erred in vacating and setting aside, by its order or decree of May 4th, 1914, the injunction granted by its former order or decree herein dated April 17th, A. D. 1914, enjoining and restraining T. E. Fitzgerald and W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, and the said American Falls Canal & Power Company is defendant.

2. The Court erred in denying by its order or decree of May 4th, A. D. 1914, the injunctive relief prayed for

by Glenn R. Bothwell, trustee in bankruptcy of the said American Falls Canal & Power Company by his petition filed herein on the 11th day of April, A. D. 1914, restraining and enjoining T. E. Fitzgerald and W. A. West from proceeding in any State Court of the State of Idaho against said trustee in bankruptcy or said American Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of the said bankrupt.

3. The Court erred in not granting an unconditional order, permanently enjoining and restraining the said T. E. Fitzgerald and the said W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, and from in any way interfering with the possession or disposition of the assets of the said bankrupt.

4. The Court erred by including in its said order dated the 17th day of April, A. D. 1914, the further words following, to-wit:

“It is further ordered that the said Glenn R. Bothwell, as Trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, make application at once for authority from the said Bankruptcy Court within the District of Utah to reconstruct and rebuild said lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company's system to the lands owned by the said T. E. Fitzgerald and W. A. West for the proper irrigation of said land, pursuant to the contracts attached to complaint in said action and to the petition herein, as Exhibit ‘B,’ the

expense of such reconstruction work to be paid as directed by said bankruptcy court; and

“It is further ordered that the said Glenn R. Bothwell, as such Trustee, report to this Court his proceedings in the matter on the 5th day of May, A. D. 1914, at the hour of ten o’clock, a. m.”

To the end that confusion may be avoided and time and space economized, and for the better convenience of the Court, inasmuch as the errors herein enumerated grow out of the same state of facts, but one argument is submitted by appellant.



## ARGUMENT.

THE ORDER REVOKING THE INJUNCTIONAL ORDER SHOULD BE REVERSED, AND THE ORDER OF INJUNCTION BE CONTINUED.

In discussing the question presented, it seems quite proper to call the attention of this Court to some now well settled and familiar principles.

Upon the adjudication of the American Falls Canal & Power Company, a bankrupt, by the United States District Court for Utah, all of the property of said bankrupt, wherever situated within the limits of the United States, in the actual possession of the bankrupt at that time, passed into the custody of the said bankruptcy Court, and title thereto and possession thereof passed to the trustee upon his appointment and qualification.

“It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. \* \* \* The exclusive jurisdiction of the Bankruptcy Court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition.”

Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S. 300, 307.

The rule has been well stated in *re Rodgers* (C. C. A. 7th, Cir.), 125 Fed. 169, 180:

“The filing of a petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by law for the benefit of creditors, and an appropriation of it to the payment of the

debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."

Edward Murphy vs. John Hofman Co., 211

U. S. 562, 569-570;

U. S. Fidelity & Guar. Co. vs. Bray, 225 U. S.

205, 217;

Robertson vs. Howard, 229 U. S. 254, 260,

261;

Hebert vs. Crawford, Trustee, and Leblanc,

228 U. S. 204;

Morehouse vs. Giant Powder Co. (C. C. A.

9th Cir.), 206 Fed. 24;

In re Jersey Island Packing Co. (C. C. A.

9th Cir.), 138 Fed. 625.

The finding of the Court in the particular case is:

"And it appearing to the Court that said bankrupt was possessed of property located within the State of Idaho, and that the legal title and possession of said property was in the trustee prior to the institution of said proceedings." (Rec. 51.)

W. A. West and T. E. Fitzgerald had in the year 1906, contracted with the American Falls Canal & Power Company (now bankrupt), for the purchase of certain shares of water rights from the company's water system in the State of Idaho. After the American Falls Canal & Power Company had been adjudicated a bankrupt by the United States District Court for Utah, and after the trustee in bankruptcy had been appointed and after said West and Fitzgerald had knowledge of such appointment, they commenced on the 6th day of April, A. D. 1914, an

action in the District Court of the State of Idaho. In said action they allege: "That unless a receiver is appointed by this Court and authorized to take possession of this system and administer and complete the same, these plaintiffs, and each of them, and the other water-right holders under said system who have not received water in accordance with their water deeds, will suffer great and irreparable injury and loss. \* \* \* That the amounts of deferred payments due or to become due on said deeds amounted to several hundred thousand dollars," etc., etc. (Rec. 22.) And the prayer is: "That some competent and proper person be appointed receiver by the Court, with power to complete said system and with full power to collect sufficient moneys due and owing or to become due and owing from the holders of water deeds entered into with said defendant corporation, and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed." (Rec. 23.)

While the jurisdiction of the primary Court of bankruptcy in the administration of the bankrupt's estate is co-extensive with the limits of the United States, yet such Court cannot send its process outside of the limits of its district; and consequently ancillary proceedings are essential to be exercised by the District Courts of the United States in other jurisdictions in aid of the trustee in bankruptcy.



Babbitt, Trustee, vs. Dutcher, 216 U. S. 102;

Elkus, Petitioner, 216 U. S. 115;

Staunton vs. Wooden (C. C. A. 9th Cir.),

179 Fed. 61, 63, 64.

After the decision of those cases, Congress "passed the act of June 25, 1910, 36 Stat. 838, c. 412, amending the Bankruptcy Law specifically giving ancillary jurisdiction over persons and property within their respective territorial limits to the District Courts of the United States in aid of the receiver or trustee appointed in bankruptcy proceedings pending in another court of bankruptcy. Statutes of the United States of 1909-1911, part 1, page 838."

*Acme Harvester Company vs. Beekman Lbr.*

*Co.*, 222 U. S. 300, 311, 312.

The United States District Court for the District of Utah, being unable to send its process into the District of Idaho to halt the proceedings instituted by West and Fitzgerald and to protect the rights of the bankrupt's estate as contemplated by the Act of Congress, the trustee in bankruptcy duly applied on the 11th day of April, A. D. 1914, by petition (Rec. 1-5), to the United States District Court for the District of Idaho, in the exercise of its ancillary jurisdiction vested in it by the Bankruptcy Act, for injunctive relief staying and enjoining the prosecution by West and Fitzgerald of the action brought by them in the District Court of the State of Idaho. The United States District Court for the District of Idaho thereupon issued an order to show cause and temporary restraining order (Rec. 39-41), and upon the hearing of

such order on the 17th day of April, A. D. 1914, granted an injunction restraining West and Fitzgerald from further prosecuting the action in the State Court until the further order of the Court. (Rec. 51-52.)

We are not concerned with a case brought by a creditor in a State Court prior to four months preceding the adjudication in bankruptcy, or within the four months period. In the latter case, however, it is proper to restrain any interference with the debtor's property, as decided by this Court.

In re Jersey Island Packing Co., 138 Fed.  
625.

What we are concerned with is the attempt of West and Fitzgerald through the State Court of Idaho to wrest from the possession of the trustee in bankruptcy certain of the debtor's property by a suit in equity brought after the adjudication in bankruptcy and the appointment and qualification of a trustee. In such case a restraining order should issue for the protection of the estate and continue pending the final determination of the bankruptcy proceedings.

George B. Matthews & Sons vs. Joseph  
Webre Co., 213 Fed. 396;

In re Printograph Sales Co., 210 Fed. 567;  
Keegan vs. King, 96 Fed. 758;

In re Frazin & Oppenheim, 174 Fed. 713;

In re Duple, 117 Fed. 794;

White vs. Schloerb, 178 U. S. 542.

In Keegan vs. King, *supra*, at page 760, Judge Baker pertinently says:

“The property in controversy being in the actual custody and possession of an officer of this court at the time the suit was brought in the state court, neither that court, nor any person acting under any process issued from that court, can, without the permission of this court interfere with it; and to so interfere would be a contempt of the authority of this court. This principle is thoroughly settled by the supreme court of the United States in the cases of *Peck v. Jenness*, 7 How. 612, 625; *Williams v. Benedict*, 8 How. 107, 112; *Wiswall v. Sampson*, 14 How. 52; *Peale v. Phipps*, 14 How. 368, 374; *Taylor v. Carryl*, 20 How. 583, 594, 597; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334. And this is true, even though the property may actually remain in the hands of the bankrupt. In *re Rosenberg*, Fed. Cas. No. 12,055, ‘A departure from this rule’ as was well said by the supreme court in *Buck vs. Colbath*, *supra*, ‘would lead to the utmost confusion and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject matter of the suit?’ This court, through its receiver and trustee, having been in actual custody and possession of the property in controversy as the property of the bankrupt before the institution by the defendants of their suit in the state court, it is clearly the duty of this court to maintain such custody and possession, and to permit no other court to interfere therewith by injunction or otherwise.”

The order to show cause why an injunction should not issue (Rec. 39-41) was made returnable on the 17th day of April, A. D. 1914. On the return day Fitzgerald and West made answer to the order to show cause. (Rec. 53-55.) In their answer they admitted that they



had commenced an action in the District Court of the Fifth Judicial District of the State of Idaho against the American Falls Canal & Power Company; admitted that a copy of the complaint attached to the petition was a true copy of the complaint filed in said cause; also admitted that in and by said action they were endeavoring to secure the appointment of a receiver to complete lateral No. 33 of the canal system of said company and "to have said receiver authorized and directed to collect certain deferred payments from water-right holders in an amount sufficient to complete said lateral, not to exceed the sum of \$2,500.00."

Upon the showing made by the petition of the trustee in bankruptcy and the exhibits attached thereto and the answer of West and Fitzgerald, it clearly became the duty of the United States District Court for the District of Idaho, in the exercise of its ancillary jurisdiction, to issue an injunction restraining West and Fitzgerald from the further prosecution of said action in the State Court of Idaho.

Such an order was issued on the 17th day of April, A. D. 1914, in the following words: (Rec. 51-53.)

"It is ordered, That said T. E. Fitzgerald and W. A. West be, and they are hereby enjoined and restrained from proceeding further in said action in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, until further order of this Court."

To that extent the Court acted within its jurisdiction and did its clear duty in issuing said order.

Morehouse vs. Giant Powder Co. (C. C. A.  
9th Cir.), 206 Fed. 24.

In and by the same order, however, the Court further ordered:

“That the said Glenn R. Bothwell, as trustee in the Matter of the Bankruptcy of the American Falls Canal & Power Co., make application at once for authority from said Bankruptcy Court within the District of Utah, to reconstruct and rebuild said Lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company System to the lands owned by said T. E. Fitzgerald and W. A. West for the irrigation of said lands pursuant to the contracts attached to the complaint in said action and to the Petition herein as Exhibit “B,” the expense of such reconstruction work to be paid as directed by said Bankruptcy Court; and

“It is further ordered, That the said Glenn R. Bothwell, as such trustee, report to this Court his proceedings in the matter on the 5th day of May, 1914, at the hour of ten o'clock A. M.”

Respecting this further order above quoted, if its meaning and effect were intended to control the trustee, it should be borne in mind that in proceedings in bankruptcy “the supervision and control of trustees and others who are employed to assist them” are exclusively under the control of the Court of Bankruptcy having primary jurisdiction.

U. S. Fid. & Guar. Co. vs. Bray, 225 U. S.  
205, 217;

Robertson vs. Howard, 229 U. S. 254, 261.

Hebert vs. Crawford, Trustee, and Leblanc,  
228 U. S. 204.

The Court of bankruptcy in Utah, therefore, ac-

quired full jurisdiction of the supervision and control of the trustee.

The trustee in bankruptcy, the appellant here, however, wholly complied with the intent, spirit and purpose of said additional order, and to that end said trustees accordingly petitioned the Court of Bankruptcy of Utah. The petition and all of the exhibits thereto are set forth in the Record at pages 59 to 155. Thereupon the trustee made a report to the United States District Court for the District of Idaho accompanied by a copy of the petition and exhibits as theretofore presented to the Bankruptcy Court of Utah; (Rec. 57-58) said report showing that the petition had been duly presented to the Court in Bankruptcy and that said Court had taken the matter under advisement.

Upon the filing of said report, with copy of petition and exhibits, and on the same day, to wit, the 4th day of May, A. D. 1914, the United States District Court for the District of Idaho entered its order vacating and setting aside the order of injunction theretofore granted. (Rec. 156-157.) The order is as follows:

“It is therefore ordered that said former order, dated April 17, 1914, be, and the same is hereby, vacated and set aside, and the injunctive relief prayed for by the trustee in bankruptcy is denied.”

It is from this last order that the trustee has appealed and also petitioned for revision.

We submit that upon the record it is impossible to find any legal or judicial ground upon which to predicate or justify the order revoking the injunction.



This Court, however, has been removed from the realm of speculation by the fact that the Court below in its order denying to the appellant a supersedeas herein pending this appeal took the opportunity to place upon the record the reason which moved the Court to vacate the injunction and make the order under review here. In the order dated May 5th, A. D. 1914, denying a supersedeas (Rec. 162, 163) the Court states:

“The denial of the *supersedeas* is put upon the ground specially that the original injunction or restraining order which was vacated by the order appealed from was not signed *after a consideration of the merits of the application therefor*, but upon the assent of counsel for West and Fitzgerald, upon the condition and with the understanding on the part of the Court, that the trustee would, without delay, seek authority from the Utah court to construct the laterals referred to in the record, as he is directed to do in the order. *The trustee having now failed to comply with such direction, and having pursued a contrary course, it is thought that it would be improper to continue in force the original order.*” (The italics are ours.)

The crux of the matter appears to be that the application made by the trustee to the Court of bankruptcy *re* lateral No. 33 did not meet the expectations of the learned Judge of the Court below. The direction was to “make application at once for authority from said bankruptcy court within the District of Utah to construct and rebuild said Lateral No. 33, etc.” The Court made that order, as was later made to appear, without any consideration of the merits. The trustee, pursuant to said order, by petition laid all the facts in respect to lateral No. 33 and the connection of West and Fitzgerald there-

with before the Court of bankruptcy. That petition, together with the exhibits accompanying the same, contained a full, complete and exhaustive report to the bankruptcy Court. (Rec. 57-155.) In connection with said petition, the trustee, *inter alia*, prayed: (Rec. 79.)

“That if the Court should determine it proper and within the power of your petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner to reconstruct said lateral No. 33, as suggested in the order made by said United States District Court for the District of Idaho, and for that purpose that the Court determine the nature and extent and the amount of money to be expended for such construction work, and that the Court determine at whose expense and in what manner such work should be done.”

Turning to the petition setting up the facts, as ascertained by the trustee, it appears, among other things, by paragraph XVI (Rec. 68, 69), that Mary A. Fitzgerald, wife of T. E. Fitzgerald, and at that time assignee of said T. E. Fitzgerald, procured from the American Falls Canal & Power Company an extension of time of payments under said contract or deed and in consideration of such extension said company was released “from any and all claims for damages arising from any failure on their part to perform any of the conditions of the above-mentioned contract to this date.” Said contract is dated November 9, 1909, and is signed, “Mrs. T. E. Fitzgerald, per T. E. Fitzgerald, Her Attorney-in-Fact,” and is set forth in full (Rec. 105-106).

Moreover, the petition to the bankruptcy Court further shows that Mary A. Fitzgerald and W. A. West did

each on the 22nd day of March, A. D. 1913, bring an action at law against said American Falls Canal & Power Company in the District Court of the Fifth Judicial District of the State of Idaho seeking to recover damages for the alleged loss of trees and crops, etc., during various seasons alleged to be due to the failure of said company to properly construct said lateral No. 33, and that each recovered judgment against said company in the sum of \$2,715.00 with costs. (Rec. 69, 70, 71, 107-116, 118-132.)

Moreover, it is further shown from the facts alleged in said petition to the bankruptcy Court, that at least *prima facie*, not only lateral No. 33, but the whole water system had been constructed according to contract between the State of Idaho and the American Falls Canal & Power Company, and that the same had been passed upon and accepted by the State Engineer of Idaho and that the settlers had assumed the control and operation of said system in the year 1910. (Rec. 66-69.)

Surely, it cannot be possible that the Court revoked the injunction because the trustee in bankruptcy, the appellant here, in petitioning the Court of bankruptcy, pursuant to the direction of the Court below, set forth in his petition all the facts within his knowledge as such trustee, ascertained from a thorough investigation of the matter, bearing upon the question of the construction or repair of lateral No. 33, so as to enable the Court of bankruptcy to *advisedly* act upon the petition.

Surely, it cannot be that the Court below, without any consideration of the merits, arbitrarily revoked the



order of injunction because the trustee in bankruptcy did not seek permission from the bankruptcy Court to construct or reconstruct lateral No. 33, without disclosing to the bankruptcy Court the actual facts and circumstances as the trustee understood them to be in relation to said matter.

Surely, it cannot be that the injunction was revoked because the trustee prayed, in connection with his petition to the bankruptcy Court, in addition to the prayer just quoted:

“That the Court set this petition for a hearing at a day certain, and that the Court designate the parties upon whom notice of hearing of this petition shall be served, and the time and manner of such service.” (Rec. 78.)

Or:

“That the Court adjudge and decree the claims of the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald wholly invalid.” (Rec. 78.)

Or:

“For any other and further relief in the premises as may to the Court seem meet and equitable.” (Rec. 80.)

Or:

“That in the event the Court shall determine that any of the claims of said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald are defensive to the equity of your petitioner in and to said contracts, or are defenses at all under said contracts, that the equity and right of your petitioner in and to said contract be converted into cash, that said equity be sold free and clear of all defenses, etc.” (Rec. 79.)

The prayer of the petition should be unimportant, for relief will be directed as the facts may warrant.

It is inconceivable that, without consideration of the merits by the District Court of the United States for the District of Idaho or by the District Court of the United States for the District of Utah, the former Court would arbitrarily insist upon the construction or rebuilding of lateral No. 33, regardless of judicial determination upon full hearing by a Court of competent jurisdiction as to whether or not West and Fitzgerald were entitled to have the same rebuilt.

Is it possible that the Court would permit not only the purposes of the Bankruptcy Act to be defeated, but the rights of creditors jeopardized, by countenancing the further prosecution of said suit pending in the District Court of the State of Idaho?

We seriously insist that the duty of the Court below was to maintain said injunction, and thereby prevent the State Court from wresting the assets of the bankrupt's estate from the possession and control of the trustee in bankruptcy, thereby defeating the beneficial purposes contemplated by the Bankruptcy Act.

Even if the trustee did not, in the opinion of the Court below, strictly comply with the direction of that Court in respect to applying for authority for specific performance of the West and Fitzgerald contracts, yet that fact would afford no legal ground for vacating the injunction. Neither judicial discretion, nor failure of the Court below to consider the merits is any justification.

“Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet

always with reference to the facts of the particular case.”

*Hennessy vs. Woolworth*, 128 U. S. 438, 442.

“The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary or whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practice of equity jurisprudence.”

*Shubert vs. Woodward* (C. C. A. 8th Cir.),  
167 Fed. 47, 54.

Again, as said by the Court, speaking through Sanborn, J., in *Shubert vs. Woodward* (C. C. A. 8th Cir.), *supra*, at page 52, et seq.:

“A hearing by a federal court in equity at which the admissible evidence of a litigant is disregarded and an order or decree is rendered against him is no less a hearing in equity than one in which his evidence is considered, and the orders granting the injunction were appealable.

“Moreover, whether the court below considered the affidavits and letters or not, the appellate court may not lawfully disregard them, because upon an appeal in equity the question always is in a national appellate court whether or not the order or decree challenged is sustained by the competent and relevant evidence presented by the record before it.” Citing: *Blease vs. Garlington*, 92 U. S. 1, 8; *First Nat. Bank vs. Abbott* (C. C. A.), 165 Fed. 852; *Missouri American Electric Co. vs. Hamilton Brown Shoe Co.* (C. C. A.), 165 Fed. 283; *Druetzer vs. Frankfurt Land Co.*, 65 Fed. 642, 644.

Bearing upon the question whether the order appealed from is subject to review upon appeal, see also:

*Pacific N. W. Packing Co. vs. Allen* (C. C. A. 9th Cir.), 109 Fed. 515;



N. Pac. Ry Co. vs. Pac. Coast Lumber Co.  
(C. C. A. 9th Cir.), 165 Fed. 1.

We need not go into the merits or niceties of the question as to whether an Appeal or Petition for Revision is the proper method of bringing this matter before this Court for review, for the reason that in this case a Petition for Revision as well as an Appeal has been duly prosecuted, and we respectfully submit that whichever remedy is entertained by this Court that the order revoking the injunction should be reversed and the injunction as heretofore ordered should be continued.

Respectfully submitted,

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Attorneys for Appellant.

CHARLES C. DEY,  
A. L. HOPPAUGH,  
Of Counsel.



United States  
Circuit Court of Appeals  
For the Ninth Circuit

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GLENN R. BOTHWELL, as Trustee in Bankruptcy, of  
AMERICAN FALLS CANAL & POWER COMPANY,  
Bankrupt,

*Appellant and Petitioner,*

vs.

T. E. FITZGERALD and W. A. WEST,

*Appellees and Respondents.*

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In the Matter of AMERICAN FALLS CANAL & POWER  
COMPANY, a Corporation, Bankrupt.

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Brief of Defendants in Error

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Upon Appeal from the United States District Court for the  
District of Idaho and upon Petition for Revision  
under Section 24b of the Bankruptcy  
Act of July 1, 1898.

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W. E. SULLIVAN and  
L. L. SULLIVAN,  
*Counsel for Appellees.*





United States  
Circuit Court of Appeals  
For the Ninth Circuit

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GLENN R. BOTHWELL, as Trustee in Bankruptcy, of  
AMERICAN FALLS CANAL & POWER COMPANY,  
Bankrupt,

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vs.

T. E. FITZGERALD and W. A. WEST,

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In the Matter of AMERICAN FALLS CANAL & POWER  
COMPANY, a Corporation, Bankrupt.

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Brief of Defendants in Error

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PROCEEDINGS CHRONOLOGICALLY ARRANGED.

1913

Mar. 22—Actions commenced by West and Fitzgerald  
against Canal Company for damages for loss of  
crops, the principal issue being whether lateral  
33 was completed. (Rec. 107, 118).

Sept. 17—Judgment favor Mary A. Fitzgerald against Co.  
for \$2715.00. (Rec. 70).

1914

Feb. 24—Co. filed Voluntary Petition in Bankruptcy.  
(Rec. 1).

Feb. 27—Company adjudged a bankrupt. (Rec. 6).

Mar. 16—Bothwell elected Trustee by Creditors. (Rec. 2).

Mar. 28—Judgment by confession favor West against Co.  
for \$2715.00. (Rec. 71).

Apr. 6—West and Fitzgerald commence Receivership suit  
against Co. in State Court. (Rec. 12).

Apr. 6—Order on Co. to show cause why Receiver should  
not be appointed. (Rec. 9).

Apr. 11—Co. filed answer and applied for stay.

Apr. 11—Hearing State Court on appointment of Receiver.

Apr. 11—Petition filed in Federal Court by Trustee, to en-  
join action in State Court, and for appointment  
of ancillary trustee. (Rec. 1).

Apr. 13—State Court appoints Receiver of Canal Co.

Apr. 13—Order issued by U. S. Ct. to show cause why ac-  
tion in State Ct. should not be enjoined. (Rec.  
39).

Apr. 17—Answer filed raising question of assets; also pray-  
ing that if they were assets, then court appoint  
ancillary trustee and direct him to complete said  
lateral. (Rec. 53).

Apr. 17—Hearing U. S. Ct. on order to show cause; order  
entered enjoining parties from proceeding in  
State Court, ordering Tr. to make application to  
Utah Ct. to rebuild lateral 33 and ordering Tr.  
to report on May 5th. (Rec. 154).

May 4—Report of Trustee and hearing thereon. (Rec. 57).

May 4—Order entered vacating order dated Apr. 17.  
(Rec. 156).



May 15—U. S. Court denied Supersedeas on ground that Trustee had failed to comply with order and had pursued contrary course. (Rec. 162).

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**STATEMENT.**

We adopt the statement of Appellant as to the general proceedings in the State and Federal Courts.

For convenience we will hereafter refer to the United States District Court for the District of Idaho as the Idaho Court and the United States District Court of Utah as the Utah Court.

In order to thoroughly understand the reason for the entering of the orders of the Idaho Court it is well to know, in somewhat greater detail, what transpired in said Court. The matters there presented were in a bankruptcy proceedings and were very informal and no record made of the same except the petition, answer, and final orders.

We believe that, in justice to the lower court, this Court should be informed of what transpired and how it came about that said Court finally vacated its former order. While these matters are not all of record, we believe that inasmuch as the order of April 17th was entered by the consent of counsel for the Trustee and with his approval, we will be justified in stating herein what transpired between the Court and the attorneys. These matters are reflected in the final order of said Court, and, in fact, it is shown therein that the Court considered that its former order had not been complied with by the Trustee, and our statements are further corroborated by the order refusing a supersedeas.

First came the argument of counsel on the law features; particularly whether or not certain deferred water payments were assets; the answering parties praying that if the Court held they were assets, that then an ancillary trustee be appointed with directions to complete said lateral 33, and collect the deferred payments in an amount sufficient to complete the same. The Court held that said deferred payments were assets. Then came the discussion between counsel and Court as to the relief that should be awarded the defendants, that is, whether the Court should appoint an ancillary trustee to complete said lateral or whether he should allow the Trustee under order of the Utah Court to complete the same.

In the discussion as to the form of the order and the relief to be granted, counsel for both parties were, at first, of the opinion that it would be better to have an ancillary trustee appointed to look over the situation and report to the Court what was necessary to complete said lateral. The Court frankly stated it would rather not appoint an ancillary trustee, as then would come up the question of raising of funds for his expenses and disbursements. Attorney Skeen, attorney for the Trustee, then stated that he believed that the Trustee was very familiar with the work and could reconstruct the lateral more economically than any one else, and further, that if the Court would give him time to return to Salt Lake and take the matter up with the Trustee, that he would have him file a petition in the Utah Court praying that he be allowed to reconstruct said lateral. The Court then stated that if counsel for the Trustee would do that, it would be the best thing to do, provided he would act at once as the irrigation season was coming

on, the Court having been informed, upon inquiry, that some crops were already in and the parties desired to plant others for the year 1914. Counsel for defendants thereupon raised the point that this would necessitate their clients going to Utah, at great expense, to take part in the proceedings there, which would be taking them out of this jurisdiction, when they were entitled to have their difficulties settled in this State where the property was situated and that inasmuch as the Trustee was petitioning for ancillary administration in Idaho, they would prefer to have one appointed and have him directed to do the work which the State Court had directed the Receiver to do. The Court replied that he thought that the water right holders should not be forced to go to the Utah Court for a remedy, provided there was any contest, but that he understood from the statement of Attorney Skeen that he would attend to presenting the proper ex parte petition and getting an order directing the Trustee to do as suggested by the Court; and that it would not be necessary for the other parties to appear. Counsel for Trustee said such was his intention. Counsel for defendants then stated that would be satisfactory. The Court thereupon directed Counsel to confer and draft an order along the lines talked of.

Counsel for both parties met and drafted the order dated April 17th. This order was entirely dictated by counsel for the Trustee, with but very few suggestions by counsel for defendants. And in this very order counsel for Trustee recited that it was made to appear to the Court that it was the duty of the Trustee to apply in the Utah proceedings



for authority to reconstruct lateral 33, and the Court so found in its order of April 17th. (Rec. 154).

On May 4th, the day set in the Idaho Court for the Trustee to report as to his proceedings in the matter, Attorney Skeen appeared at Boise, Idaho. The parties met in the Judge's Chambers and attorney for the Trustee stated that he appeared to make his report. A copy of the petition filed in the Utah Court was handed to the Judge for his inspection. After glancing through the same, and reading therefrom, he remarked that the petition filed was directly contrary to the one he had ordered; that it had been understood that the Trustee would file a petition directly requesting authority to reconstruct said lateral; that there was to be no contest over the matter requiring defendants to try issues in Utah; that the Trustee had directly alleged in his petition that said lateral was properly constructed and prayed that this question and all others between the parties be heard and determined in Utah—directly contrary to the understanding and his order. Counsel for Trustee thereupon replied that after going over the matter with the Trustee, they had concluded it would be better to file the petition in another form and present all matters to the Utah Court for determination. The Court thereupon wanted to know why, if the Trustee would not file such a petition as directed, the matter had not been reported to him at once instead of filing a petition directly contrary to the understanding and the order of the Court. Counsel then stated that after talking to the Trustee they concluded it would be better to put it in the other form, so he had filed a petition accordingly. The Court then made further inquiry as to what had been done as to the petition

filed. He was informed that they had not yet been able to get the matter determined before the Utah Court. The Court then stated that it was clear to him that his order had not been carried out by the Trustee, but that he had acted contrary to the understanding had between counsel and Court that the terms of order would be complied with. The Court then added that the Trustee had come into a Court of Equity and that if he did not intend to comply with the orders of the Court, and do equity, that he could receive no relief from said Court; and the Court thereupon prepared, in the presence of counsel for both parties, the order (Rec. 156) vacating his former order.

If this Court thinks, that in justice to the lower court and appellees, we are not justified in stating the foregoing discussions as throwing light on how the Court came to enter the orders in question, and that we have transgressed on the well known rule that matters not in the record will not be considered, we then call your Honors' attention to the same facts, but not in detail, so plainly stated by the Court itself in the very orders in dispute and also in the order denying the supersedeas.

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**PURPOSE OF ACTION IN STATE COURT AND HOW QUESTION  
OF ASSETS OF BANKRUPT AROSE.**

We do not intend herein, and have not at any time intended, to dispute the rule set forth in appellant's brief to the effect that from the time of the filing of the petition in bankruptcy that the estate of the bankrupt is *in custodia legis*; and that upon adjudication, the property of the bankrupt, wherever situated within the limits of the

United States, passes into the possession of the Court. But the question that arose in Idaho, both in the State and Federal Courts was, were certain deferred payments on water contracts assets. To explain, we will briefly state our position on the institution of the action in the State Court after the Canal Company was adjudicated a bankrupt. Just prior to the institution of the action in the State Court, the Supreme Court of the State of Idaho had rendered a decision in the case of Childs v. Neitzel, 141 Pac. 77, directly bearing upon deferred payments on water contracts going to the completion of a canal system and holding that the Canal Company or its mortgagee cannot collect the same when the Company is insolvent and the system not completed.

The Court held:

“Those contracts were made by the purchasers of water rights with the Murphy Company and that Company could not have enforced the collection of the deferred payments and interest thereon without complying with the terms thereof as to the construction of said system and the delivery of water, and neither the mortgagee nor the assignee could acquire any greater rights in that regard than the Murphy Company itself had under said water contracts.”

“However, if water has not been made available to others holding water contracts, in case the construction company is insolvent, such water right owners might be injured by the noncompletion of the system, and upon proper application, a court of equity might require the payments due and to become due from the water users to whom water had been made available to be paid to a receiver to be used in the completion of such system.”

So we contended that the deferred payments under the Childs-Neitzel decision could not go to or be collected by



the Canal Company (or its Trustee in Bankruptcy) or by the mortgagee, holding the water contract as collateral, but must go into the system. So there are no assets until the system is completed which the Trustee could take possession of or hold or distribute. The deferred payments, above all creditors whether secured or unsecured, must go to complete the system. The Trustee in Bankruptcy could not collect as assets something which the bankrupt could not collect.

We further contended that the local laws govern largely as to what are assets of the bankrupt, the varying rights of debtor and creditor under the laws of the several states and what interests attached under the laws of the different states by certain parties in the property of the bankrupt depend entirely on the state laws. Therefore the laws of Idaho as to what were considered assets would control.

And further, we contended that the fact the system has not been completed took the deferred payments out of the assets of the bankrupt estate as defined in Sec. 70a of the Bankruptcy Act.

The amount to complete the system is an amount which the creditors of the bankrupt could not take in payment of their claims. It is well recognized law that the trustee has no better title than the bankrupt had, that he stands in the shoes of the bankrupt and is affected by every equity which would affect the bankrupt himself if he were asserting the same rights and interests.

Such was the basis of the action in the State Court after institution of the bankruptcy proceedings.

**ORDER CONSISTED OF TWO PARTS, DIRECTING ONE PARTY TO DO ONE THING AND THE OTHER PARTY TO DO ANOTHER.**

The order of April 17th contained two clauses, one against the appellees herein and one against the appellant. Briefly stated, they are as follows:

1. Enjoining West and Fitzgerald from prosecuting their action in State Court.
2. Directing the Trustee to make application at once for authority from the Utah Court to reconstruct lateral 33.

The above order is not appealed from. So if this Court holds that an appeal is the proper remedy on such orders, rather than a petition for revision, then clause No. 2 is final and must stand as the time for appeal on said order has expired.

If, however, this Court determines that the petition for revision is the proper remedy, then it becomes necessary to discuss the error assigned in the petition for revision on the above clause 2, wherein appellant takes the position that the Court erred in including said clause in said order.

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**IT WAS THE DUTY OF COURT TO ENTER ORDER ON TWO MATTERS.**

Appellant contends on page 20 of his brief that upon the showing made, it clearly became the duty of the Idaho Court to issue an order restraining further prosecution of the action in the State Court and then states that it was the duty of the Idaho Court to enter the first clause as it was within its jurisdiction, but that in entering the second clause, it exceeded its jurisdiction.

In answering such contention, we claim that under the same petition of the Trustee and exhibits attached and the answer of West and Fitzgerald, there was a further duty to be performed by the Court. We will admit for the purpose of the discussion of this question that it was the duty of the Court to enter clause one as to the restraining order. We then have two duties which should have been performed by the Court under the matters presented, as follows:

1. Duty to enter restraining order.
2. Duty to appoint an ancillary trustee to act in Idaho.

Appellant entirely overlooks the second duty when in fact this is where the real controversy between the parties arises. If the Court had complied with its second duty and appointed an ancillary trustee and submitted the matters to him for action then there would have been no need of clause 2 in said order. And it was upon the promises, and with the assurance of counsel for Trustee, to carry out the desire of the Court that the Court entered clause 2 in its order instead of appointing an ancillary trustee. Now it is appellant's endeavor on this appeal to retain clause one on the restraining order against defendants in full force and have clause 2 against the Trustee vacated or declared to be of no force and effect. If such practice is, or has been, permitted by any Court, whereby parties can promise to do certain things and consent to an order and after they secure the advantage they desire thereunder, wholly disregard that part directed against them and still ask relief under the same order, we have been unable to find any authorities which will support such action and conduct. While there may have been no in-



tention whatever on the part of counsel for the Trustee to deceive the Idaho Court, the Trustee should not be allowed at this time to rescind that portion of the order which was against him. It should be borne in mind that this procedure was in April and the irrigation season was approaching and that the Trustee, by action of its counsel in consenting to the Order of April 17th, gained further time, to-wit, May 4th, 1914. If the order had not been agreeable to the counsel for Trustee, then the Court would have appointed an ancillary trustee and the West and Fitzgerald matters would have been taken up at once and no doubt determined so that they would have been able to have obtained relief by having lateral 33 completed so they could have received water for their crops and the irrigation of their lands during the season of 1914. So we believe that even if counsel for Trustee was acting in entirely good faith in assenting to said order, and it was his intention to have the same carried out as agreed upon, the Trustee should not be allowed at this time to seek to rescind said clause 2. It would be allowing him to take advantage of his own wrong, that is, allowing him to repudiate an agreement in Court entered for his interests, but still seeking to obtain the benefit of that portion of the order against his opponent.

He could not say to his counsel, I will not file such a petition, but I will file one just the contrary, and meanwhile you need not report to the Court that I will not comply with his order, but we will take our full time and get along into the irrigation season as far as possible so they will get no water at least this year.

This case is not similar to one where a Court had only

one duty to perform and order one party to do one act and then of his own motion order the other party to do another act. In such a case the additional order might not have any real legal existence. But how different here. The Court had jurisdiction and the pleadings required the Court to enter an order in reference to two matters. Here counsel for petitioner, recognizing the authority of the Court to enter an order appointing an ancillary trustee, steps in and requests the Court not to enter such an order and suggests, in lieu thereof, that the same result can be secured in another way, without causing the adverse parties any trouble or expense, and then requests that an order be entered accordingly. The entering of the order in the form suggested, under such circumstances and in lieu of an order that the Court had jurisdiction to enter, makes it a legal and valid order that can only stand and be considered as a whole and as one order, and if violated by either party, then that party should be promptly and equitably denied any relief if he petitioned or appealed to still have that part of the order against his adversary stand in full force and effect. This principle is so elementary in equity and so well established that we do not deem it necessary to cite a single case in support thereof.

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**IDAHO COURT DETERMINED LATERAL NEEDED RECONSTRUCTION.**

As showing that the Idaho Court in the proceedings before it found that it was necessary to reconstruct lateral 33, and that the only thing it requested of Trustee was to secure authority for him to do the work, we call attention

to the introductory part of the order of April 17th, as follows:

“And it further appearing that it is the duty of the said trustee in bankruptcy to apply to the referee in bankruptcy for authority to reconstruct and rebuild a certain lateral conveying water from American Falls Canal & Power Company system to the lands of said T. E. Fitzgerald and W. A. West—commonly known as Lateral No. 33—so as to properly irrigate said lands.”

The above fully supports that part of the order directing the Trustee to make application for said authority and shows the Court had concluded that it was necessary to reconstruct. The question of the necessity of reconstruction was before the Court and fully presented, besides the record itself showed that the Company had contested this identical matter in the State Court and that the jury had found that said lateral had not been completed and a judgment entered thereon from which no appeal had been perfected, also that Company had thereafter confessed judgment in favor of West in an action wherein the same issue was raised; and still other matters arising since the Fitzgerald judgment wherein the Company had signified its willingness to reconstruct and raise said lateral were presented to the Court and it then found as above set forth and followed with the clause in the order herein in dispute.

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**ANSWERING APPELLANT'S ARGUMENT THAT TRUSTEE DID  
COMPLY WITH ORDER.**

On page 22 of the brief of appellant it is stated that the Trustee did wholly comply with the intent, spirit and purpose of the order in question. To make such a statement and believe in the same requires some peculiar reasoning.



We submit that but one conclusion can be reached upon examination of the order, to-wit, that the Trustee was to "make application at once for authority from said Bankruptcy Court within the District of Utah, to reconstruct and rebuild said lateral 33 . . .". We are unable to understand by what processes of reasoning such language can be construed as meaning that the Trustee should file a petition that would put at issue the fact of whether lateral 33 needed reconstruction and then if it was found by the Utah Court that it did not need reconstruction, to then so order. It hardly seems possible that anyone could ask any Court to place such a meaning on such language. The meaning of the order is so clear that but one conclusion can be reached, to-wit, that the Trustee for his own sinister purposes, openly and purposely violated said order of the Court. The trouble lies not in his construction of the order and its plain intent, but in the fact that the Trustee substituted his own wishes for the directions of the Court. He well knew what the understanding was between all counsel and the Court and the purpose and intent of the order. But he thought he saw another chance to put defendants to further trouble and expense and probably make them litigate over again in Utah the question of whether or not lateral 33 had been completed. He and his engineers had taken an active part in the trial in the State Court when this issue was directly raised and tried. The jury found that the lateral had not been completed and awarded Fitzgerald damages. The Canal Company then confessed judgment in the West case wherein the same issue was raised. The record herein gives in full the complaints and shows the issues raised in the State Court and

also shows that judgments were entered in favor of the plaintiffs.

The appellant harps upon the exhaustive petition that he filed with the Utah Court and argues that it was a full and complete statement of the differences between appellant and appellees in reference to lateral 33. The appellant especially refers to several matters set up in said petition, to-wit (pp. 24 and 25) :

1. A certain release of Fitzgerald.
2. That the whole system had been completed and accepted by the State Engineer.
3. That the settlers had assumed operation of system in 1910.

and then argues that all these things were necessary to properly advise the Utah Court; and that it could not be expected that the Trustee would ask the Court's permission to reconstruct lateral 33 without disclosing all the *actual facts and circumstances*.

These matters give but one side and for some peculiar reason the Trustee in his alleged able petition fails to give further facts regarding said release, to-wit, that at the trial it was proven that there was a further consideration for said release, namely, that the Company would complete said lateral 33 so that Fitzgerald would be able to receive water from that time on; and that the Canal Company then failed to comply with this consideration and further that the matters concerning said release and the considerations therefor were, under proper instructions of the State Court submitted to the jury and they by their verdict held that Fitzgerald was not bound by said release.

Again, the Trustee failed to give all the facts and circumstances concerning the completion of the whole system and its acceptance by the State Engineer or all of the facts concerning the assumed control and operation of the system in 1910 by the settlers. There were two sides to all of these questions and they were fought out before the State Court and we therefore most sincerely urge that the petition was most unfair. We simply mention the fact as to the release as an example in showing how faulty the petition really was from appellees' view point. And we could likewise complain of many of the other issues raised. Appellant no doubt will say that we could have appeared before the Utah Court and met these issues. True, we could if it had been necessary, but that was not the understanding nor in accordance with the order; they had all been once tried in the State of Idaho where the property is situated and between the same parties and it would have been very inconvenient and expensive for appellees to produce their proof in Utah. The Trustee in his petition prayed that the parties might be noticed to appear and that the Court determine all controversies between all the parties and that the Court adjudge the claims of West and Fitzgerald wholly invalid, etc. Such a prayer, raising such issues, was, under the circumstances herein, most unfair and well deserved the condemnation it received in the order of May 4th.

Appellant seeks to justify its position by clause 4 of the prayer, "That if the Court should determine it proper and within the power of the petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner



to reconstruct said lateral No. 33, as suggested in the order made by the United States District Court. . . .”.

The wording of the very first line “that if the Court should determine” is a complete disregard of the order of the Idaho Court in that said order in no way contemplates that any issues whatever be raised or determined by the Utah Court. The further words “as suggested in the order” likewise condemn themselves, and show that the Trustee had no intention of complying with said order but was acting on his own initiative, as there is not a single word or sentence in said order which will, under the most extreme construction, warrant the statement that the Court “suggested” any such thing. The said order provides that the Trustee make application at once for authority to reconstruct lateral 33 and does not read that the Trustee shall make application to the Utah Court to hear and determine whether or not said lateral *needed* reconstruction. The order itself shows that it had been made to appear to the Idaho Court and it had reached the conclusion that said lateral needed reconstruction and all it then required was for the Trustee to get authority to do such reconstruction.

The Trustee reported that he had duly presented a petition to the Utah Court and that the Court had the same under advisement. This was 18 days after said order of April 17, and from a reading of the petition requesting that the adverse parties be notified to appear and litigate all their differences, thus raising many issues, it is not strange that the Court had it under advisement and still has it there.

The appellant seeks to excuse his action for praying in his petition for service and placing all matters again in

issue, by the statement, that the prayer should be unimportant, as relief will be directed as the facts warrant. But this excuse does not ring true when so many issues of fact were raised. If the Court could have entered any ex parte order whatever on such a petition it would have been to deny authority to reconstruct.

On page 27 of Appellant's brief, he states that it is inconceivable how either Court without consideration, would insist upon reconstruction of lateral 33. There is nothing inconceivable about it when it is remembered that this issue had been tried by the State Court and later confessed by the Company and the Idaho Court was about to appoint an ancillary trustee, but the Trustee steps in and says: "There is no need to do that; I will get an order from the Utah Court to reconstruct said lateral myself and you can so order, and here is an order prepared by me to that effect."

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UTAH COURT HAD NO JURISDICTION OF MATTERS PETITIONED FOR; WHILE IT COULD HAVE LEGALLY GRANTED THE AUTHORITY REQUESTED BY ORDER OF THE IDAHO COURT.

Under Sec. 2 of the Bankruptcy Act, the District Courts of the United States in the several states are made Courts of Bankruptcy and are invested with certain jurisdiction at law and in equity, *within their respective territorial limits*. Said Sec. 2 (20) gives said Courts power to exercise ancillary jurisdiction over persons and property within their respective territorial limits in aid of a Trustee appointed in another Court of Bankruptcy.

Counsel for appellant admits the inability of the Utah

Court to send its process into the District of Idaho to start proceedings in Utah affecting said assets of the Bankrupt. So, evidently acting under said Sec. 2, it petitioned for relief in the Idaho Court and prayed for the appointment of an ancillary trustee to assist him in regard to the assets and matters in relation thereto in Idaho. (Rec. 5).

Then appellees in their answer to the order to show cause, issued under said petition, likewise joined in the request for the appointment of an ancillary trustee, provided the Court held against them on the question of assets, and further prayed that their complaint filed in the State Court, a copy of which was attached to said petition of the Trustee, be treated as their petition in the proceedings before the Idaho Court and that the relief prayed for therein be granted by said Court and that the ancillary trustee, when appointed, be directed to complete lateral 33 and that he be authorized to collect the deferred payments in amounts sufficient to complete said lateral. (Rec. 54).

Now, under the above, it must be admitted that any acts of the ancillary trustee approved by the Court appointing him, or any order or judgment of said Court, in respect to property of the Bankrupt within its territorial limit, would be conclusive and binding upon the Trustee and the primary Bankruptcy Court. If the Trustee did not like the action of the ancillary trustee and the ruling of the Court appointing him, he could not then object to the same and say, this does not suit me, I am under the control of another Court and the ancillary trustee is under me, so I will have the Court which appointed me review this matter and take another course. Such is not the law and the remedy of the Trustee, if he disapproved of any act of the an-



cillary trustee, would be to call the matter to the attention of the Court appointing the ancillary trustee and then if that Court passed upon the matter contrary to his views, then he would have his remedy by appeal or revision to the Circuit Court of Appeals. So the attempt of the Trustee to give jurisdiction of the Idaho parties and subject matter to the Utah Court by the petition which he filed was directly contrary to law and practice in bankruptcy matters. In such a case the Trustee can receive no relief whatever in the Utah Court. But by said Sec. 2 (20) another Court, the Idaho Court, is given jurisdiction over the matters involved herein and to that Court a Trustee must apply for any relief he may seek in regard to such matters and must then abide by the decision of that Court or have the same set aside on review. And the more one considers the petition that was filed by the Trustee in the Utah Court, the more he becomes convinced that it was an attempt to secure an improper and illegal control of certain matters which by express statute were placed within the jurisdiction of another Court.

While the foregoing has the effect of making that part of the order as to the Trustee petitioning in Utah improper if considered alone, that is, that the Idaho Court had no jurisdiction to compel the Trustee to do anything contrary to his wishes, and over his refusal and objection in the Utah Court the situation changes when he consents to act instead of one who could be appointed and compelled to act. The purpose of having the Trustee act, in order to save providing for expenses of ancillary trustee, and having one acting in the bankruptcy matters instead of two and further having one act who was familiar with the com-

pany's business and system, is clearly apparent from the orders and proceedings herein.

The only thing in the order of April 17th that Trustee could complain of was where it directed the Trustee to "make application at once" to Utah Court. He would have been at liberty to refuse to make any such application, but instead he consented, through his attorney, to make one, so the thing that might have been lacking and defeated the jurisdiction of the Idaho Court, to-wit, the consent of the Trustee to make an application for authority to construct (not an application to hear and determine whether construction was necessary) was proffered and accepted, and so imparts validity to the order.

If the Trustee had made the proper application, and the Utah Court had authorized him to do the things stated in the order, there can be no doubt that such authority would have been legally and properly granted.

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TRUSTEE BY HIS CONSENT CAME UNDER CONTROL OF  
IDAHO COURT AND VIRTUALLY BECAME ANCILLARY  
TRUSTEE AS TO MATTERS BEFORE THAT COURT.

Appellant argues that the supervision and control of Trustees are exclusively under the control of the Court of Bankruptcy having primary jurisdiction and cites three cases. An examination of these cases will show that they nowhere mention that such control is under the Bankruptcy Court having *primary* jurisdiction.

Nevertheless the control of Trustee may be admitted to be in the Primary Bankruptcy Court *as long as he stays within the jurisdiction of that Court*, and then following

this reasoning we shall expect counsel for appellant to admit in return that the control of an ancillary trustee is in the Court appointing him.

Since the amendment of the Bankruptcy Act allowing ancillary proceedings in other states, we believe that the acts of the ancillary trustee are controlled by the United States Court of Bankruptcy which appointed him, and that the matters decided by said Court would be conclusive and that the Court of Bankruptcy having primary jurisdiction would be compelled to recognize the final orders entered by the Court appointing the ancillary trustee, that is, so far as matters within that State are concerned. Our contention, therefore, is that the act of the Trustee being within the jurisdiction of the Idaho Court, and his assenting and agreeing to do as Trustee what an ancillary trustee could have been required to do, places him in a position where the control over him as to matters and property within the State of Idaho, directly before the Court, would be as conclusive as it would over an ancillary trustee duly appointed. In other words, he is in effect an ancillary trustee, in so far as what he agreed to do in relation to the matters affecting the property situated in Idaho, and brought on by his own proceeding.

The act of the Trustee in assenting to the order whereby he was to do a certain thing which an ancillary trustee could have been ordered to do, was equivalent to his own appointment as ancillary trustee for said purpose. And he could not stand on one foot in the Idaho jurisdiction, as to matters which the Court there had under its control, and say, here I stand as an ancillary trustee and agree to do certain things—and then shift to the other foot upon cross-



ing the line into Utah and say, here I stand as the Trustee, and am controlled by the Utah Court and therefore will refuse to do what I promised to do in the nature of an ancillary trustee because I do not believe it is the best thing to do as Trustee.

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**NON-COMPLIANCE BY TRUSTEE OF THE MUTUAL ORDER  
ENTERED WITH HIS CONSENT WAS A LEGAL GROUND  
FOR VACATING SAME.**

Appellant contends that even if the Trustee did not comply with the order of the Court that fact would afford no legal ground for vacating the injunction.

The first case cited by appellant is more in favor of appellees. Appellees are not disputing the fact that a Court acts in its discretion when granting an injunction. In fact this principle is adopted; and we contend that in the exercise of this discretion, the Court may place other terms in the Order in the nature of conditions precedent.

Neither is the other case, *Shubert vs. Woodward*, 167 Fed. 47, in point for the reason that the Court there refused to read or hear certain proof and ordered an injunction. In that case the lower court disregarded the evidence and of its own motion refused to consider the matter upon the merits. We believe the Circuit Court of Appeals properly reversed the lower court and held that although the lower court did not consider the matter upon the merits, the same must be considered by the appellate court. We do not believe that case can be applied to the present case. If the Court in the present case had, of its own motion, refused to consider the matter upon the merits and arbitrarily en-

tered the order of April 17th, then we believe appellant might well have cited the Shubert case in support of his contention. But in the present case, by the consent of all counsel, and with an express understanding on the part of the Court from counsel for the Trustee, the order of April 17th was entered. It simply amounts to this; that the Court having taken the position that the deferred payments were assets, then had another duty to perform, to-wit, appoint an ancillary trustee to assist in administering the assets in the State of Idaho. After discussing this question, counsel for the Trustee agreed that if the Court would not appoint an ancillary trustee that he would file a petition by the Trustee in the Utah Court to have done the very things which the ancillary trustee would be asked to do in Idaho. The Idaho Court no doubt realizing that it could not compel the Trustee to file such a petition in the Utah Court said: "Well, if you will do that, it will save me appointing an ancillary trustee here." And so it was with this understanding between all parties that such a procedure was agreeable to the Trustee and would be faithfully carried out that the Court allowed the attorneys to draft and prepare an order that was agreeable to both. That this was the understanding is clearly shown in the order of May 4th and in the order denying the supersedeas. Now, is it equitable for the Trustee, under such conditions, to appear before this Court and argue that the clause he consented to was an improper clause and therefore he can repudiate the same after he has assisted in having the Court enter such an order? We do not admit that the order was in any way improper, but even if it was, we then claim that the Trus-

tee by his assent to the order and by leading the Court to enter the same, is estopped from now claiming that it was an improper order. It must be remembered that by consent to such an order he induced the Court not to enter the alternative remedy of appointing an ancillary trustee in the State of Idaho.

Again, the action of counsel for Trustee in consenting to such an order and promising to execute the same *ex parte* induced counsel for defendants to assent to such an order. Otherwise, counsel would have objected to such a clause and stood on their rights and on the Trustee's own petition and asked that an ancillary trustee be appointed. Appellant admits in his brief that the Utah Court was unable to send process into the State of Idaho to stay defendants in their proceedings there, and the Trustee, thus knowing this to be the law, endeavored to take advantage of the order of April 17th by filing such a petition as raised all issues between the parties in the Utah Court and prayed for service upon West and Fitzgerald.

So we contend that the action of the Trustee in assenting to the order through his counsel and preventing the order which necessarily would have been made for the appointment of an ancillary trustee takes this case out of the class of such cases as the Shubert-Woodward case.

The Trustee wanted the Utah Court to get control of the entire matter and have the matters involved herein under his direct supervision. To get what he desired, he led the Idaho Court to believe he would do certain things. Now, can it be just or equitable for him to repudiate the very clause which conferred upon him the thing desired? Can he now say I have secured the advantage I sought, but I



will not comply with the clause assented to and which gave me such advantage?

The Trustee by his action has surely waived any right to now attack the order which his attorney agreed to—even prepared—and was instrumental in having entered.

Even granting, for the sake of argument, that, on the merits, the Trustee was entitled to a restraining order, there was at the same time another thing on the merits which the other parties were entitled to, namely, the appointment of an ancillary trustee. In order to get control of a matter which the Trustee did not control under the situation which had developed, to-wit, the matters of West and Fitzgerald as to lateral 33 and which would come under the supervision of the ancillary trustee when appointed, the Trustee, through his counsel, consented to the order containing a clause directing him to do certain things and agreed to comply therewith in lieu of a clause appointing an ancillary trustee. The irrigation season was about on, and immediate action was vital to defendants. So the consent of the Trustee to be directed in the same order to do the things which would give the relief required, made the order a mutual one. The Trustee should not, after the 18 days allowed him had expired, then report he had not done what the Court ordered, but had done something else more to his own liking and thus virtually say to the Court that it could do nothing about it either, because that portion of the order against the adverse party must stand as he was entitled to that regardless of his actions in violating that portion of the order directed to him. Under such a situation was it not lawful, legal, equitable and right for the

Court to do just as it did do, and treat the order as one mutual equitable order and vacate it in toto?

The appellant came into the Idaho Bankruptcy Court asking equitable relief by seeking to have a restraining order entered against the appellees. The principles and maxims in equity, to-wit, "He who seeks equity must do equity" and "He who comes into equity must come with clean hands" are too well established to even require discussion; these principles have been recognized in thousands of cases similar to the case at bar. We shall therefore content ourselves by merely stating the general principle of said maxims, from which it will be readily seen that the appellant herein is in no position to ask relief from the order of May 4th.

"In applying the maxim, He who seeks equity must do equity, as a general rule regulating the action of courts, it is necessarily assumed that different equitable rights have arisen from the same subject matter or transaction, some in favor of the plaintiff and some of the defendant; and the maxim requires that the court should, as the price or condition of its enforcing the plaintiff's equity and conferring a remedy upon him, compel him to recognize, admit, and provide for the corresponding equity of the defendant, and award to *him* also the proper relief."

"It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."

1 Pomeroy Eq. Juris. Secs. 397, 404.

"This is a general principle, applicable to all classes of cases whenever necessary to promote justice, and requires that any person seeking the aid of equity shall have accorded, shall offer to accord, or will be compelled to accord to the other party all the equitable

rights to which the other is entitled in respect to the subject-matter. Relief inconsistent with the equities of the adverse party will be denied, and where the granting of relief raises equitable rights in favor of defendant, the according of such rights will be imposed as a condition of granting the relief. It is on this principle that one who has failed to perform his own obligations under a contract cannot compel the other to perform."

16 Cyc. 140-1. Citing many cases..

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#### JOINDER OF APPEAL AND REVISION.

Appellant has, evidently out of abundant precaution, joined two methods of review, to-wit, an appeal and a petition for revision. It does not appear to us that such practice should be recognized by this Court.

It is not quite clear either, whether the attempted appeal is an equity appeal, under the general equity practice, or a bankruptcy appeal under Sec. 25a of the Bankruptcy Act. If an equity appeal, then we object to the same for the reason that it would be improper to join same with a petition for revision in bankruptcy matters, covering not only the order appealed from but another order.

If a bankruptcy appeal, then we complain because what is a matter of appeal under Section 25a of the Bankruptcy Act, is not a matter of revision under Section 24b. There can be no question under the direct provisions of Section 24b, that the Appellate Court can only revise matters of law. The cases are unanimous on this point and it is needless to cite same.

Questions of law are alone reviewable in proceedings under Section 24b, by petition for revision, if a review of



questions both of law and fact is sought, the remedy is by appeal.

If such a procedure is countenanced by this Court or other United States Courts, we contend then, that it at least should only be in cases where the errors assigned are identical, and not cases where the petition for revision raises additional errors from those raised on the appeal, and the Court is asked to revise the same order as the one appealed from.

While there may be cases where Courts have recognized the joining of a bankruptcy appeal and a petition for revision on the same identical matter, and from the same order, we are satisfied that not a single case can be found where a bankruptcy appeal on one order has been joined with a petition for review on another order, or where an equity appeal has been joined with bankruptcy revision. In the petition for revision herein, appellant seeks to revise the orders of April 17th and May 4th, while the appeal herein is from the order of May 4th only.

Appellant has only one remedy and he should select the one desired. It seems unfair for a party to say: "I have a remedy, but I will not determine exactly what remedy I have, but will leave it to the Court to solve and therefore will join all remedies which I might have, in order to be safe. It is fair neither to the Court nor to counsel for appellees. No argument is made and no authorities are cited by appellant to assist the Court in determining which is the proper remedy except two on appeals and from this we might infer that appellant believes an appeal to be his remedy. So it will be necessary for this Court to make an examination into the matter of its own accord to determine

what remedy the appellant has. And it is very essential that this Court decide which is the proper remedy. If the remedy is by appeal from such orders, then only questions should be considered by this Court as raised on the appeal and the appeal is from one order only. But in the petition for revision they seek to have the former order, not appealed from, revised and assign a new error in regard to a certain portion of said order. Therefore if an appeal is proper, the errors raised on the petition for revision under the order of April 17th, cannot now be raised as no appeal was taken from said order and the time for an appeal has expired. And this is very important for the reason that if an appeal is proper and no appeal was taken from the first order, then that order must stand just as it is and appellant surely cannot ask relief therefrom when he fails and refuses to carry out that part of the order directed to him.

Appellant gives this Court no light as to which is the proper procedure and we are at a loss to know whether they expect appellees to brief this question or whether they intend to leave it to this Court.

It does seem that appellant should have briefed the question thoroughly and presented the authorities on both remedies to this Court and then have shown that the question of the proper remedy herein was so close that appellant is justified in joining two bankruptcy reviews, or had a right under the practice of Federal Courts to join an equity appeal with a bankruptcy revision.

A combination of an appeal and a simultaneous revisory petition is also unfair to appellees for the reason that if they are unsuccessful in this Court, then it will necessitate a division of the record on appeal to determine what costs

on appeal they should pay. They surely cannot be charged with costs on the improper remedy. Therefore we contend that it is necessary for this Court to first decide which remedy is appropriate and then consider the assignments of error raised in the review under such remedy.

It is further unfair to the appellees for the reason that if a bankruptcy appeal is the proper remedy, then the record shows that the same was not taken or perfected within the ten-day period as prescribed by Sec. 25a of the Bankruptcy Act; and to properly meet this, appellees should file a motion to dismiss and argue the same. It then might turn out that this Court would hold that the petition for revision was the proper remedy and therefore the appeal was of no force and effect. Then appellee would have wasted their time and the time of this Court in presenting a motion to dismiss a useless and improper appeal. If the appeal is not the proper remedy herein, then, of course, it makes no difference whether or not the appeal was perfected in time, as it is of no force or effect. Then again, if this Court held that an appeal is proper, then appellees should be given an opportunity to move to dismiss the appeal because the Court probably would not do so of its own motion. Appellant may say that we should move to dismiss at this time, but then as heretofore shown, this would necessitate an argument which might be useless if the Court first holds that the appeal is not a proper remedy as in such case there would be no need of a motion to dismiss, on the ground that it was not taken in time. It would be a question of jurisdiction and this Court would of its own motion then dismiss the appeal. And so if this Court believes it has no jurisdiction to hear an equity appeal joined



with a bankruptcy revision then it should of its own motion dismiss the proceedings.

From the foregoing, we submit that the order of the United States District Court vacating its former order of April 17th should be sustained, and that appellant under his petition for revision should be denied any relief.

Respectfully submitted,

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